ETHICAL DECISIONMAKING AND ETHICS INSTRUCTION IN CLINICAL LAW PRACTICE

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INTRODUCTION

Ida Brown was eighty-six, increasingly confused and physically ill. Two doctors, including her treating physician, certified that she was incompetent. The social services department sought the appointment of a guardian for her, in order to sell her home in which she had lived for forty-seven years and put her in a nursing home. Ms. Brown told her student attorneys to tell the guardianship court she wanted to be left alone. One of the students thought the law clinic should consent to the appointment of a guardian. His supervisor disagreed, arguing that the clinic should develop an in-home care plan, but if Ms. Brown rejected it, assert her “leave me alone” argument in court.¹

Tony was fifteen, learning-disabled and in trouble again. He re-

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Since 1989, our school has required students to take a course that both integrates theory and practice and provides legal services to unrepresented people. To satisfy this requirement, students have the qualified right to choose either a clinical course or a “legal theory and practice” (LTP) course. LTP courses integrate experiential education into traditional first-year and other courses. See Students and Lawyers, Doctrine and Responsibility: A Pedagogical Colloquy, 43 Hastings L.J. 1107, 1107-86 (1992) (containing articles by LTP teachers Barbara Bezdek, Richard Boldt, Marc Feldman, Theresa Glennon and Homer C. La Rue). The Law School offered 19 clinical and LTP courses during 1995-96. These courses establish an experiential continuum that stretches from first-year civil procedure, property and torts courses, into the “in-house” clinic, and, through hybrid clinical models, into public law offices. See infra note 11.

We thank Barbara Bezdek, Robert Condlin, Deborah Hellman, Alan Hornstein and Laura Skudrna for their many good editorial suggestions. We express our special appreciation to Rosemarie Loverde for her limitless assistance in typing the many drafts of this article and for skillfully managing the authors’ equally limitless revisions. Finally, we thank our legal research assistants, Sean Brohawn, Alison Loughran, Thomas H. Cohen, Nora Frenkel, Elizabeth F. Harris, Keli Isaacson, Booth Ripek and Dirk Schwenk, for their great help.

¹ See infra Parts I(A)(1), I(A)(3)(a) for full case study.

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fused to attend school, despite the fact that a juvenile court had ordered him to do so as a condition of probation on a theft conviction. He had a long juvenile "rap sheet" and was one step away from confinement. Tony refused to accept the private special education placement that the clinical supervisor wanted to offer to the court as an alternative to confinement. If he had to attend school, Tony wanted to enroll in his neighborhood school, which, in over seven years, had failed to teach him how to read most three-letter words. The student attorneys wanted to assert Tony's position, not the clinical supervisor's.²

In this article, we use case studies like Ms. Brown's and Tony's to consider how clinical teachers and students make ethical decisions and how we teach ethics.³ By "ethics," we mean positive law — rules, statutes and common law principles — as well as common moral principles. The Model Rules and Model Code of Professional Responsibility are important sources of ethics law.⁴ We also use other bodies of substantive law,⁵ however, we emphasize that legal ethics include moral principles, and that lawyers make ethical decisions with moral reasoning.⁶

² See infra Parts I(A)(2), I(A)(3)(b) for full case study.
³ Our tutorials occur in either the 1:1 supervisor/student model or in a team of students in the 1:2 or 1:3 supervisory model. We believe that most of what we say in this article applies to both the single-student and multi-student models.
⁴ Geoffrey C. Hazard drafted the Model Rules of Professional Conduct (2d ed. 1992) for the Commission on Evaluation of Professional Standards ("Kutak Commission") as the Commission's reporter. Professor Hazard argued that the Commission intended to give greater legal (as opposed to aspirational) status to ethics rules by substantially revising the Model Code of Professional Responsibility (1980). "It is time that lawyers and the organized bar came to understand that they are governed by law, bound by law, and answerable before the law like other people." Geoffrey C. Hazard, Jr., Rules of Legal Ethics: The Drafting Task, 36 Rec. B. City N.Y. 77, 84 (March 1981). We share Hazard's apparent frustration with lawyers in one respect. We sometimes practice against attorneys who transform the "rules are vague" argument (which often is true) into a "there are no real rules" excuse (which is not true) for sloppy analysis or self-interested defiance of the Model Rules. One point of ethics rules is to control conduct and the Model Rules and Model Code serve as a necessary starting point.
⁵ For example, constitutional law principles govern lawyer advertising and solicitation; the Rule 11 sanctions of the Federal Rules of Civil Procedure regulate frivolous litigation; and the legal malpractice principles of tort law establish and revise standards of practice. David Luban & Michael Millemann, Good Judgment: Ethics Teaching in Dark Times, 9 Geo. J. Legal Ethics 31, 53-58 (1995). This regulatory revolution suggests that "[a] lawyer who follows only the Model Rules may end up in jail, and an ethics [or clinical] professor who teaches only the Model Rules has committed malpractice." Id. at 58.
⁶ See Thomas L. Shaffer, On Teaching Legal Ethics In The Law Office, 71 Notre Dame L. Rev. 605-06, 608-09 (1996). Shaffer describes the moral content of conversations about ethical problems as "the most dramatic effect" of "clinical legal ethics" courses in the Law School's Legal Aid Clinic. Id. at 606. In Shaffer's view, such a law office "becomes a place of moral discourse, virtually any time two or three are gathered together there to practice law." Id. at 609. The students are fully engaged in ethical inquiry both inside and
Because clinical teachers have the ultimate responsibility for the ethical decisions in their legal work, they "make" these decisions directly, or indirectly by failing to overrule the student's ethical decision. This raises two questions, to which we respond with two theses. First, by what process should we make ethical decisions and teach ethics? We argue that clinical supervisors generally should use a multiperspective approach (which we call the "pluralistic" method of analysis), working dialectically to produce the "best" ethical answer. Second, if there is no consensus best answer, who should decide the ethical issue — the supervisor or the student? We try to identify some factors that suggest when a clinical teacher should decide the ethical issue directly, by imposing judgment, and when we should decide indirectly, by deferring to the student.

We explore our theses with the help of experiences from our clinical practice, which we offer as context for our analysis. In gathering and analyzing these experiences, we have learned as much from what we have done wrong as from what we may have done right. The underlying ethical issues are about the roles of lawyers. We did not chose this theme a priori. Instead, we began by describing in case studies the most challenging ethical issues that we confront in our practices. When we collected the studies, the lawyer role issues predominated.

We begin in Part I(A) by using Ms. Brown's and Tony's cases to outside of class, because they must resolve the real ethics problems in the real cases before them. Id. at 608.

Resorting to moral principles is inevitable in making ethical decisions. The Model Rules and other bodies of positive ethics law are "broadly permissive." Luban & Milleman, supra note 5, at 58. By preserving large measures of ethical discretion, the drafters of the Model Rules have thrown lawyers "back on the resources of their own judgment," which includes moral judgment. Id.

7 Student practice rules make clinical supervisors ultimately responsible for legal decisions. Model Rule 5.2 similarly makes a supervising lawyer generally responsible for the acts and decisions of a "subordinate" lawyer. See George Critchlow, Professional Responsibility, Student Practice, and the Clinical Teacher's Duty to Intervene, 26 Gonz. L. Rev. 415, 426 (1990-91) (arguing that the Model Rules "contemplate supervisory intervention for the purpose of resolving good faith disagreements [between a supervising and subordinate lawyer] and not only to prevent immediate harm" to the client).

8 We do not attempt to fully define "pluralism." We include within it different perspectives, which we subdivide into vantage points and bodies of knowledge, and legal and personal values. To be pluralistic, perspectives, for example, should be representative of the range of differing (including competing) perspectives about the issues to be decided, in our case ethical issues.

9 In the case studies we sometimes quote supervisors. They expressed their thoughts retrospectively in the process of writing this article. We provide substantial amounts of additional information, much of which comes from the clinic case files. We do not cite to the documents in the files because, among other reasons, we found we could not do this without running the risk of waiving a client privilege or disclosing confidential information. In this article all names of clients are fictitious.
consider the pluralism within the supervisor-student team. We identify two sources of ethical judgment which both students and clinical teachers possess, but in different forms: knowledge and vantage point.\textsuperscript{10} We include both in “perspective.” We try to identify some typical differences in the bodies of knowledge and perspectives of students and clinical teachers, although we readily acknowledge that the many different forms of supervisor-student relationships make it difficult to generalize with accuracy.

In Part I(B), we add the perspective of the client to the pluralistic mix. We argue that the student must understand the client’s perspective to identify the client’s primary goal, to effectively advise the client, to diligently pursue the client’s case, to practice competently and, thus, to act ethically. The ways in which lawyers and clients are different — e.g., in race, gender, sexual orientation, age, culture or class — can obstruct a lawyer’s ability to see things from the client’s perspective. To make this point, we use case studies from our AIDS law workgroup. Because our indigent HIV-positive, minority and gay clients often face bias, students must surmount differences not only to establish a sound bilateral relationship with a client, but also to effectively represent the client before often hostile or uninformed decisionmaker.

In Part II, we argue that clinical teachers make ethical decisions and teach ethics when they decide whom the clinic will represent and the legal work it will do. We examine both micro-selection decisions (i.e., the choices of subspecialty practices and individual clients) and macro-selection decisions (i.e., the choices of groups of clients, practice specialties and types of practice experiences) to further develop our two theses.\textsuperscript{11} We argue that clinical teachers should use a pluralistic method to make these structural ethical decisions as well as the discrete ones discussed in Part I. We identify the selection perspectives of students and clinical teachers, and contend that these two sets of perspectives can often complement and/or compete with each

\textsuperscript{10} We include one’s capacity to reason within “knowledge.”

\textsuperscript{11} The clinic is a single teaching law office that is divided into largely autonomous practice specialty workgroups. There usually are eight second-year and third-year students in each workgroup. The workgroup supervisor teaches the students in supervisory sessions (usually one to three students) and in seminar-style classes of the entire workgroup. The clinical teacher also chooses and supervises the legal work. See \textit{infra} Part II. Our “in-house” workgroups include criminal defense, disability and homeless person’s law, children’s law, elder and health law, AIDS law, mediation and environmental law practices; and less regularly, housing, consumer, constitutional and death penalty law practices. The clinic also represents clients, including community-based groups, in new specialty workgroups that combine some of the features of in-house clinical courses and externships. These specialties include appellate practice, family law, immigration law, criminal prosecution in child-abuse and domestic violence cases and economic, housing and community development law. We have developed these workgroups, as well as some in-house workgroups, partly in response to student suggestions. See discussion \textit{infra} Part II (C).
other.

We argue that clinical teachers have a sense of the whole: how selection decisions can integrate, and thereby accomplish, the frequently conflicting goals of clinical education. Clinical teachers also understand the value and strategies of reform, and the extraordinary importance of the post-Brown\textsuperscript{12} law reform tradition in this country.

On the other hand, many of our students have had important life experiences with justice and poverty, which we partially suggest by the concept of "diversity." The students' perspectives are relevant to selection decisions especially when they coincide with the experiences of potential clinic clients. We describe the ways in which student perspectives have helped us to develop several of our new workgroups, including one that provides transactional legal services to community-based groups.

In Part III, we recommend adding the perspectives of others, and we describe co-teaching relationships that we have developed with a practicing lawyer, legal ethics professor (who is a philosopher) and social work instructor. These co-teachers enrich ethical analysis in several ways. We focus specifically on how they help us better identify the interests of third parties in ethical analysis.

To help the reader understand both what we say and who the speakers are, we briefly describe how we wrote this article. Either one or two of us had primary responsibility for each part or subpart. Because the other authors have substantially edited each subsection, however, the original writer does not express solely her views.\textsuperscript{13}

Collaboration has reduced the professional distance between us that our clinic structure produces. During the nearly twenty-month life of this project, we have engaged in one of the most sustained, structured and useful conversations that we have ever had with each other. It has challenged each of us to identify, justify and refine our views. Our collaboration has helped us to resist the self-protective instinct to retrospectively patch ethical cracks and fill ethical holes as we describe decisions that one of us made or helped students to make. The teacher's values influenced those decisions.\textsuperscript{14}


\textsuperscript{13} When our collaborative process worked best, the formula included constructively critical colleagues; a project coordinator and in-group editor (several of us rotated these responsibilities); an extraordinary external editor (one of the editors-in-chief of the \textsc{ Clinical Law Review} ); tolerance for inefficiency and occasional scholarly outbursts; and respect for disagreements.

Because we do not think in lock-step, this article does not coincide perfectly with the views of each, or probably any, of us. At times, the debate has been vigorous, the points of disagreement substantial and the process of completing a final draft difficult. Consistent with our pluralistic thesis, we have learned the most from our disagreements; the loss of individual control and accountability, however, are obvious costs of collaboration. For us, and we hope for the reader, this is a fair price to pay for the benefits of collaboration.

PART I. DISCRETE QUESTIONS OF ROLE AND RESPONSIBILITY

A. Identifying the Perspectives of Supervisor and Student: Learning Ethics From Each Other

1. Ms. Brown's Case: Representing an Allegedly Disabled Client in a Guardianship Proceeding

Ida Brown was an eighty-six year old African-American woman who was sliding into dementia. She was typical of many of the clients in our guardianship clinic. The department of social services ("DSS") petitioned the local court for guardianship, arguing that Ms. Brown could no longer take care of her health needs or manage her finances. DSS wanted to remove her from her home, sell it and use the proceeds to put her in a nursing home. DSS alleged that Ms. Brown had no friends or relatives, except for her next-door neighbor, Lydia Hunt, who had asked DSS to intervene.

The court appointed the clinic to represent Ms. Brown and the supervising attorney assigned two students to the case. One member of the pair, Lisa, had taken quickly to clinic, progressing rapidly and doing well. She was a strong person and an excellent student who developed a very good relationship with her clinical supervisor. Her partner, Andrew, often was the first to answer a question in class. He attributed this to being from a large family in which it was necessary to talk first to get attention. He was warm, friendly and laid back. He seemed to enjoy his clinic work, though he did not work especially hard.

The supervisor, who had been a clinical teacher for only a few months when the clinic agreed to represent Ms. Brown, did not pretend to be neutral on the issue of client autonomy. Her autonomy-

insistent version of Condlin's position: "I doubted 'that one person should be counted on both to take charge of advocacy, as supervisor, and then preside alone over tough-minded analysis of what was done.'" John M. Ferren, The Condlin-Redlich Exchange, in THE GOOD LAWYER, supra at 360, quoting John M. Ferren, Goals, Models, and Prospects for Clinical-Legal Education, in THE UNIVERSITY OF CHICAGO LAW SCHOOL CONFERENCE SERIES No. 20, 94, 118 (E. Kitch ed., 1969). Here we offer our experiences not as objective historical accounts, but as examples of the various points that we seek to make.
protective philosophy evolved during her fifteen years experience as a legal services elder law attorney. She expressed her views openly and invited her students to do the same, promising to respect their opinions. As the senior partner in the supervisor-student practice relationship, she reserved the right to override those opinions in case decisions, if she believed they would harm the client.

The supervisor and her two students went to interview Ms. Brown in her brick row house on a side street in a rundown working class neighborhood. Andrew had met Ms. Brown the day before when he stopped by to arrange the appointment, but when the three arrived, Ms. Brown was not expecting them and did not recognize Andrew. To her they were three white strangers. When they told her they were her lawyers, they lost ground. Nevertheless, she let them in.

Ms. Brown was clean and neatly dressed, her home was tidy and warm (it was late fall) and she had food in her refrigerator. She was alert and opinionated, but it was clear that her memory was impaired. She reported that she had a nephew and cousin, for example, but she could not remember their names or phone numbers.

Ms. Brown had been divorced for many years and had no children. Her brothers and sisters had died. She had worked as a maid in local hotels, and had used the earnings to support herself and to purchase her home. She was immensely proud that she owned her home and lived independently. (The clinic team would soon learn that independence was one of the strongest features of her personality.) Ms. Brown admitted that she did not like to ask people for help and she denied needing help of any sort. She said, grudgingly, that she would accept assistance if she needed it.

Ms. Brown did not know about the guardianship petition, which the students found in a stack of unopened mail on her kitchen table. Attached to the petition were two doctor's certificates, including one from her treating physician, that said Ms. Brown was incompetent.\textsuperscript{15}

\textsuperscript{15} Medical assessments of Ms. Brown's competency varied. Of the two certifying doctors, one said that she had a mental disability diagnosed as "senile dementia NOS [not otherwise specified] . . ."; that the nature of the disability was memory impairment, poor judgment and paranoid delusion; and that the extent was severe and global. The other labeled the disability as "[d]ementia; senile variety"; stated that the nature of the disability was dementia, that the cause was cerebral atherosclerosis; and that the extent was "severe: patient can't manage her own affairs." A physician whom the clinic asked to evaluate Ms. Brown used a more functional assessment, finding that Ms. Brown was "alert, pleasant, clean and cheerful." This physician said that Ms. Brown was physically agile and strong, and "neurologically intact but had a marked memory deficit." She was impressed by Ms. Brown's recognition of her memory deficit and her efforts to compensate for it. The doctor concluded her evaluation by saying that Ms. Brown could continue to live at home with assistance. For a discussion of different approaches to the legal determination of incompetency, see Philip B. Tor & Bruce D. Sales, Guardianship for Incapacitated Persons, in Law, Mental Health, and Mental Disorder 203 (Bruce D. Sales & Daniel W. Shuman
When she learned about the guardianship proceeding, Ms. Brown said she "would go nuts" in a nursing home. She wanted this problem to just go away, and along with it, these attorneys in her kitchen. Despite repeated assertions that they were "on her side," these people brought her trouble she did not understand and would rather do without.

As the three left Ms. Brown's house, Lydia Hunt hailed them. Ms. Hunt had lived next door to Ms. Brown for over forty years. She described the impressive measures she had taken to help Ms. Brown. She cooked and cleaned for her, she said; she kept a key in case Ms. Brown got locked out; and she gave her rides to the doctor's office. Although she tried to keep an eye on Ms. Brown, "it had got to be too much" for her and Ms. Hunt had called DSS for help.

Ms. Hunt explained that the DSS social worker had tried to convince Ms. Brown to pay for in-home care from her monthly Social Security check, but that Ms. Brown had refused to do so because she denied that she needed help. Ms. Hunt said that she "would hate to see Ms. Brown go to a home," but she badly needed someone to take care of her and manage her finances.

The interview with Ms. Hunt was sobering. On the drive back to school, Andrew expressed strong doubts about Ms. Brown's competency; Andrew thought she did need a guardian and someone to care for her. He would, on her behalf, probably consent to the appointment of a guardian so that she could get the care she needed in a nursing home. Andrew emphasized that, without Ms. Hunt, Ms. Brown would not be able to stay at home. He sympathized with Ms. Hunt, and pointed out that she could not be expected to provide the professional in-home assistance Ms. Brown needed.

Many attorneys and most of the judges in our jurisdiction would have agreed with Andrew. When the court appoints counsel to represent an alleged disabled person, lawyers frequently play the role of guardian ad litem rather than that of advocate.\(^{16}\) Many local lawyers

\(^{16}\) Lawyers who adopt this stance believe that the attorney appointed to represent an allegedly disabled person may substitute the attorney's judgment for that of the client, and recommend to the court the disposition the attorney believes is in the best interests of the client. Other lawyers for the elderly, including the clinical supervisor in Ms. Brown's case, argue that the attorney should treat the client like any other to the greatest extent possible. They argue that the adversary system likely will produce a fair and equitable result: one which will be in the best interests of the subject of the proceedings. See Maria M. das Neves, Note, The Role of Counsel in Guardianship Proceedings of the Elderly, 4 Geo. J. LEGAL ETHICS 855 (1990-91); Lawrence A. Frolik, Plenary Guardianship: An Analysis, a Critique and a Proposal for Reform, 23 ARIZ. L. REV. 599, 633-37 (1981); Vicki Gottlich, The Role of the Attorney for the Defendant in Adult Guardianship Cases: An Advocate's Perspective, 7 MD. J. CONTEMP. LEGAL ISSUES 191 (1995-96); Anne K. Pecora, The Consti-
appointed to represent the allegedly disabled person investigate the facts and file a report with the court, opining that their client is incompetent and in need of a guardian, regardless of their client’s position.

Lisa disagreed with Andrew, reminding Andrew of a case the clinic had appealed that semester in which the attorney had disregarded his client’s wishes.\textsuperscript{17} Lisa argued that if we could not counter the medical evidence against Ms. Brown, we should look for alternatives to a guardianship. Even if we could not develop a good alternative plan, we should advance Ms. Brown’s stay-at-home argument as forcefully as possible. She had important liberty interests at stake and “the system,” not we, should determine whether those interests ought to yield to DSS’ conception of her best interests.

In the resulting conversation, the supervisor listened to both students and then suggested that they withhold judgment and develop more facts. “Why,” Andrew asked, “do we need to do more investigation?” If it wasn’t clear that Ms. Brown needed help only a guardian could obtain for her, weren’t the basic facts at least established?

The supervisor explained later: “From my years on earth, I know that things are rarely as simple as they seem. Andrew, in his early twenties, had not yet learned this. I encouraged him to check things out, to test the facts, to see what he could uncover. I wanted him to discover the ‘underlying motivations’ that we had discussed in our theory of interviewing sessions, to answer the question: Why was this case filed now?” In the supervisor’s experience, further investigations often produced new important information that DSS had not discov-

\textsuperscript{17} In that case, court-appointed counsel filed a report stating that his client wanted her caretaker to be her guardian, however, at the hearing he recommended to the court that he be named guardian for her $200,000 estate. The court accepted that recommendation and appointed the attorney as guardian of the property. The clinic intervened, challenging the appointment on conflict-of-interest grounds. In class, the guardianship practice group and supervisor discussed at length whether the attorney had provided the kind of independent and appropriate advocacy that is ethically required. The appellate court found that the court had not abused its discretion in appointing the attorney as guardian, and did not consider the ethical issues. A judge who concurred in the result said:

The function of the attorney that the court must appoint to represent an allegedly disabled person who does not have counsel of her own choice is to be an advocate for his client. The function of [a guardian \textit{ad litem} appointed by the court] . . . is to act as an investigator for and, in a sense, advisor to the court. The inherent conflict, or potential conflict, between these two roles is exemplified by what occurred in this case.

In \textit{Re: Adoption/Guardianship No. 93187050/CE166964, No. 1887} (Md. Ct. Spec. App. Aug. 16, 1994). The guardianship court later appointed the same lawyer involved in this appeal to represent Ms. Brown in a new guardianship petition that was filed about a year after the court dismissed the petition in our case. Within a week, the court had appointed him to be the guardian of her property.
ered. This experience had helped the supervisor develop a standard of diligence the students lacked.

The additional investigation paid off. Andrew and Lisa eventually talked to the neighbor who lived on the other side of Ms. Brown and learned some interesting facts. Ms. Hunt was not a disinterested witness. She wanted very much to buy Ms. Brown’s house so she could move her son and grandchildren in next to her. In addition, contrary to the DSS report, Ms. Brown had a nephew who lived in the city. Upon locating the nephew and his wife, the students discovered that they were educated professionals who appeared anxious to help Ms. Brown. The students worked with them to develop an appropriate in-home services plan for her.

There was, however, one basic problem. Despite these new and promising developments, Ms. Brown refused to delegate authority to anyone to handle her money. The nephew’s wife was an accountant who had agreed to manage Ms. Brown’s financial affairs, but Ms. Brown refused to execute a financial power of attorney. Her economic independence was more than an abstract autonomy right; it was the core of Ms. Brown’s self-identity and she refused to give it up. Ms. Brown’s alleged inability to manage her finances was a crucial issue for DSS, however, and the agency refused to dismiss the case unless she accepted help.

The supervisor, from her experience in this jurisdiction, was convinced that, rightly or wrongly, Ms. Brown would be removed from her home if she did not appoint a financial agent. And, despite what DSS and the doctors said, Ms. Brown seemed competent to make a limited financial power of attorney, if she would.

The supervisor and students pondered the next step. They analyzed exceptions to client-centered decisionmaking, and concluded

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18 Ms. Brown’s utilities had been turned off once because she did not pay the bill. Given Ms. Brown’s memory deficit, if the clinic did not propose that someone take over her finances, the supervisor knew that the judge would appoint a full guardian for Ms. Brown. Because home health care is hard to find and supervise, and Medicaid insurance seldom covers the costs, it was likely that the guardian would sell Ms. Brown’s house and use the proceeds to pay for assisted living or nursing home care. Indeed, DSS had laid out this plan in its petition.

that they had knowledge about the guardianship system, and a well-justified fear of its effects, that Ms. Brown lacked. They decided that to achieve the client’s ultimate goal, they would try to persuade her to sign the power of attorney. The hard questions, they thought, were how to convince her and how vigorously and persistently to try if she refused to sign. The supervisor took the lead in making the critical case decision to do everything they could reasonably do to get her to sign, although the three struggled to identify the line between persuasion and coercion.

The students prepared the power of attorney so they could show it to Ms. Brown. They hoped the paper would not seem as frightening as the idea. The supervisor accompanied Lisa and Andrew to Ms. Brown’s house. The students presented the document to Ms. Brown and listed the reasons why she should sign. She ignored the students. The supervisor stepped in and Ms. Brown told them to come back the next day. They did. She did not sign. She told them to come back later in the week.

They went back again. On that afternoon, they had a marathon session in which the two students, relatives, friends and the supervisor filed in and out of Ms. Brown’s small bedroom, each of them trying to frame a winning argument. As they did, Ms. Brown lay in her bed, a tiny, frail person covered with a thin blanket who refused to give up her right of self-governance. She berated them for being there, for bothering her when she wanted to take a nap and for persisting in

20 The supervisor later said: “Although I might have let the students try this on their own, I had formed my own relationship with Ms. Brown during the semester break while both students were out of town. I had covered the case for them and had visited Ms. Brown on several occasions. I could not disappear now.” We will argue that the supervisor's modeling/intervention was an essential teaching method in this case. See infra Part I(A)(3).

21 The collective advice had some of the hallmarks of a public defender's advice to criminal defendants who he believes should accept a plea offer:

If you decide that your client needs to accept a plea offer, sell it to him as if your life depended upon it. His does. Do what it takes to convince him, whether it is making pro-con charts of the facts, having him talk to other lawyers in the office, or even having him cross-examined by another lawyer so that he sees his defense demolished.

... If you know what your client should do, you push it even if your client believes you are selling him a rotten fish. If you have got a trust relationship, trust will pull you through.

Sometimes, it does not work. You have pushed so hard, you pushed your client right out of the relationship. He loses all faith in you. At that point, you get out. You have done everything your education and intuition and training taught you to do. And it did not work. You lost the plea and you lost the client.


Although Ms. Brown was not facing incarceration, she risked a loss of liberty as significant as many of Bellows' clients.
their demands that she sign. Describing her thoughts at this time, the supervisor said: "I despaired, and sat planning our defense in court. I wondered how well Ms. Brown would stand up to cross-examination. Very well, I thought. I knew that I would not want to conduct it."

In the end, Ms. Brown picked up a pen and signed the power of attorney. The person who finally convinced her was an old friend, a man she had raised as an unofficial foster son. Was her signature supported by consent? Yes and no. She understood, in general ways, both the purpose and the effect of the document and her ultimate self-interest in signing it. This probably was "legal" consent. But, in signing, Ms. Brown had crossed a line she had hoped never to cross. She did so very unwillingly.

The DSS attorney immediately challenged the power of attorney, arguing that the two doctors' incompetency certificates established that Ms. Brown lacked the legal capacity to sign. He expressed outrage that the supervisor and students had induced an incompetent person to sign a legal document, hinting darkly to the students that this might be an appropriate matter to refer to the state bar's disciplinary body. Disregarding the least restrictive alternative principle in Maryland's personal guardianship statute, the DSS attorney vowed to press on with the case no matter what alternatives the students developed.22

The students took Ms. Brown to another doctor. She concluded that Ms. Brown retained substantial decisionmaking ability, although her memory was significantly impaired. She also thought Ms. Brown could do well at home with the appropriate support services.23

Lisa then interviewed Ms. Brown's treating physician, who had signed one of two certificates of incompetency. To Lisa's relief, the doctor said that he had signed the certificate only to ensure that Ms. Brown took her prescribed medication, applying, one might charitably say, a "contextual" competency standard. He had not known that there were family members who were willing to help Ms. Brown to do this. The doctor agreed that, in light of the available help, Ms. Brown was not incompetent.24

When the clinic presented this new evidence and the in-home plan to DSS, the social worker and her supervisor told their attorney to dismiss the case. He did so reluctantly. When we closed the case,

22 MD. CODE ANN., EST. & TRUSTS §13-705(b) (1991 & Supp. 1995) states: "A guardian of the person shall be appointed if the court determines from clear and convincing evidence that a person lacks sufficient understanding or capacity to make or communicate responsible decisions concerning his person . . . and that no less restrictive form of intervention is available which is consistent with the person's welfare and safety." (emphasis added).

23 See supra note 15.

24 See Tor & Sales, supra note 15.
Ms. Brown was at home and, with the help of her nephew and his wife, continuing "to age in place."

"We do not know," says the supervisor, "whether Ms. Brown ever felt that we had helped her. If she did, she never said so. She was not one of those clients who thank you with cards or home-baked pastries. My strong guess is that she was glad to see the last of us."

Postscript: In writing this article, we checked to see how Ms. Brown was doing. The work we did apparently kept her in her home for another year. According to court files, a local hospital filed another guardianship petition against Ms. Brown about a year after our case ended. She had been a patient for six weeks due to congestive heart failure and progressive dementia. The hospital alleged that Ms. Brown was not able to return to her home. No one notified us about the new petition, and the court appointed a local attorney to represent Ms. Brown. Within a week, the court appointed the local Department of Aging as guardian of Ms. Brown's person, and her attorney as guardian of her property. While Ms. Brown's nephew and his wife apparently were willing to be named guardians, the court did not appoint them. The court file contained some indications that they failed to respond to the hospital's requests to seek a nursing home or assisted living facility for Ms. Brown. After the hearing, Ms. Brown was placed in two or three different group homes, where she languished; she was moved to a nursing home about six months later. Her house was sold for $20,000 to a real estate agency.

Before we analyze this case study, we present a contrasting case study, in which the students took the lead in making the "paternalism or client autonomy" decision.

2. Tony's Case: Representing a Juvenile Client in a Probation Revocation Proceeding

Tony's student attorneys recounted their first impressions of their fifteen year old client with broad, romanticized strokes. His face, they said, was reminiscent of an El Greco painting — childish, but proud; his swaggering demeanor, an act of camouflage that masked more pain than most of us experience in a lifetime; his small stature (he was five feet and weighed 100 pounds) made him appear vulnerable. He was the tough survivor of what some might call a dysfunctional family.

Tony's substantial paper record, on the other hand, coldly described him as a defiant kid of borderline intelligence who had a long juvenile record and a history of school failure. The record gave him an assortment of labels: "attention deficit hyperactive disorder," "com-

25 See supra note 17.
munication disorder” and “seriously emotionally disturbed.”

Tony’s juvenile court public defender referred his probation revocation case to our children’s specialty practice workgroup because she recognized Tony’s special educational needs.26 The juvenile judge had ordered Tony to attend school as a condition of probation for theft of property, the latest of Tony’s many property offenses.27 Belatedly recognizing the extent of Tony’s educational needs, the school system had assigned Tony to a “special” school for learning disabled students. But, in the supervisor’s view, that school “warehoused,” rather than educated, its students.

The school also was in the heart of a predominately African-American neighborhood and adjacent to one of the city’s worst public housing projects. Tony is white and had lived all his life in an insular, white, working-class neighborhood. Racially-inspired assaults and fights were a regular part of his school life. When he missed thirty-nine out of the last forty-five school days, the state moved to revoke Tony’s probation.

Tony was one of six clients whom Ellen and Steve would represent this semester. Ellen was a thirty-nine year old wife and mother of two, who lived in a middle-class suburb. Trained as a cancer researcher, she brought a strong interest in social issues and children’s work to law school. Steve was twenty-three and had a distinctly conservative outlook. He was the son of a police officer and a school teacher, and his parents had given him a strict upbringing in a blue collar, predominately white, New Jersey town that had some of the characteristics of Tony’s neighborhood. He had a realistic assessment of Tony and his world. Both students were bright, self-motivated and mature. They were among the best the supervisor had taught in recent years.

Their supervisor was an experienced clinical teacher and self-described “reformer who grew up professionally in the legal culture of the 1960s and 70s.” She adds that the 1980s and 90s “have not dulled my sense of outrage at the failure, sometimes intentional refusal, of school systems to enforce the special education laws.” Her workgroup

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26 When Tony was seven years old, the school system found him eligible for special education services, although it soon broke its legally-mandated promise to provide the special reading and vocational services that he needed.

27 Tony was arrested at age nine for aggravated assault. This charge, like many others, was either dismissed or informally handled at intake. At ages 13 and 14, he had numerous arrests for attempted thefts of automobiles and other property. At 14, he was referred to juvenile court for prosecution, adjudicated delinquent for attempted car theft and placed on probation. He was later arrested on several theft charges. At age 15, he was again adjudicated delinquent and placed on probation for theft, with the condition that he attend school.
handles special education cases as well as juvenile defense work, and it has developed strong relationships with excellent private, special education programs. With the clinic's help, Tony had an opportunity to enroll in one of these programs. If he did, the judge might reinstate Tony's probation. If he did not, the supervisor believed the judge likely would confine Tony in an overcrowded juvenile institution that was the functional equivalent of a prison.\textsuperscript{28}

Tony, however, did not want to go to school at all, and he was our client.\textsuperscript{29} If he had to, he wanted to go back to his neighborhood school, which the state was considering placing in the equivalent of educational receivership. Only one in five students who entered the ninth grade were still enrolled by their senior year. If Tony returned to this school, he was virtually certain to be one of the other four.

\textsuperscript{28} Children slept on mattresses on floors, spent much of their time locked up and received little useful education or training. Indeed, the institution's staff identified Tony's educational needs (in reading, math and science) and then frankly admitted they could not provide the educational services to meet these needs.

\textsuperscript{29} Our standard retainer agreement in juvenile delinquency cases expressly provides that the child is the client to avoid conflicts of interest between the parent and child. Both the child and the parent(s) sign the agreement. This agreement embodies, we believe, the better position in the "parent or child: who is the client?" debate. See, e.g., Martin Guggenheim, The Right to be Represented But Not Heard: Reflections on Legal Representation for Children, 59 N.Y.U. L. Rev. 76 (1984). Guggenheim observes that in juvenile delinquency proceedings, some believe that the lawyer should follow his own view or the parent's view of what is in the best interests of the child. \textit{Id.} at 88. However, Guggenheim contends that "a strong argument can be made that attorneys should be bound by their young client's instructions." \textit{Id.} at 86. In his view, consistency demands that we treat juveniles as autonomous because "[i]t would be both inconsistent and unfair to treat the child as a morally responsible actor who must suffer the legal consequences of his own delinquent acts and yet, at the same time, deny that he is autonomous enough to be capable or entitled to instruct counsel in the adjudication of those same acts." \textit{Id.} at 87. We agree. \textit{See also Institute of Judicial Administration-American Bar Association Joint Commission on Juvenile Justice Standards, Standards Related to Counsel for Private Parties, Standard § 3.1(b)(i)(b) (1980) ("where counsel is appointed to represent a juvenile subject to a child protective proceeding, and the juvenile is capable of considered judgment on his or her behalf, the determination of the client's interest in the proceeding should ultimately remain the client's responsibility, after full consultation with counsel."). See also Special Issue, Ethical Issues in the Legal Representation of Children, 64 Fordham L. Rev. 1279 (1996).

In Tony's case, however, the special education dimension complicated the analysis. Federal law provides that the parent "is the individual who attends the [educational planning] meeting and makes the decisions." 34 C.F.R. § 300.344(a)(3) (1995). \textit{See, e.g., Individuals with Disabilities Education Act, 20 U.S.C. §§ 1415(b)(1)(a) (parent's right to examine records), 1415(b)(1)(C) (right to prior written notice of educational changes), 1415(b)(2) (right to hearing); but cf. id. § 1417(c) (protecting the rights and privacy of parents and students). The regulations that implement the Act similarly grant rights to the parent, not the student. \textit{See, e.g., 34 C.F.R. §§ 300.500 (referring to parent's "consent and evaluation"), 300.502 (parent's right to examine records), 300.504 and 300.505 (rights to notice and consent), 300.506 (right to hearing). Therefore, a juvenile court judge probably could offer a special education placement in lieu of institutional confinement only if both the child (the client in the juvenile court) and the parent (the functional client in the related special education proceeding) agree to accept it.
When Tony dropped out, he likely would graduate from the juvenile justice system to the adult corrections system. The supervisor thought it was less likely that the juvenile judge would accept the neighborhood school option in lieu of confinement.

Tony's father, Jack Edwards, agreed with Tony's choice. Tony and his father had a close and loving relationship. But, Mr. Edwards was an alcoholic. When the students visited Tony's home early in the morning, Mr. Edwards sometimes was too drunk to communicate effectively. He worked day construction jobs when he was sober and could get them.

The collective despair of Tony and Mr. Edwards was grounded in their reality. Tony had never been in a private special education program like the one the students were describing and therefore could not imagine it. Mr. Edwards denied there was "anything wrong" with Tony, in part he said, because Tony was similar to him. Mr. Edwards had completed only the third grade and thought formal education was of little value.

As graduate students, Tony's student attorneys were top achievers. Tony once remarked that he felt the students looked down on him because of his illiteracy. Although both students made an effort to understand Tony, he eventually developed a connection with Steve, who interestingly maintained a more critical view of Tony's behavior and choices.

The students met with Tony individually, or with Tony and his father together, on over five occasions to try to convince Tony that he should accept the special education placement. Counseling sessions frustrated everyone. The students believed Tony and his father "were not listening" or "did not understand" when the students explained why they thought the judge would more likely confine him if he did not accept the special education placement, and why, in any event, it would be good for him. Tony thought the students should help him do what he wanted to do.

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30 Tony's mother had left Tony's father and her two sons when Tony was only two years old. She later remarried and had two daughters with her new husband. She did not maintain a relationship with Tony.

31 According to psychiatric reports, Mr. Edwards suffered from "very low self esteem" and appeared to use alcohol to "self-medicate."

32 The students' memorandum of these conversations said: We tried to explain these facts [about the neighborhood school and special education placement] to Tony and his father. But as they sat there patiently waiting for us to finish with our... advice, it became increasingly obvious that their ears had long been shut by the frustration that comes from dealing with a bureaucracy like... city schools... Mr. Edwards... explain[ed] that, so far, he's followed everyone's advice and it has only made matter worse. By the time of our initial interview, Mr. Edwards had already made preliminary contacts at the neighborhood school in an
After reaching impasse, the supervisor asked the students to decide whether the clinic could and should present the court with both a special educational plan and Tony’s position as an alternative, and then let the court decide.

The supervisor and students concluded that the net effect of presenting the special education “option” to the court would be to override Tony’s decision. The court quickly would identify the clinic as the sponsor of the plan and defer to it, without fairly considering Tony’s proposal. The students then considered whether they ethically could override Tony’s decision.

The students found the relevant bodies of law to be multi-layered and complex, in itself an important ethical lesson.33 The students looked for the meaning of “legal capacity” in Maryland’s common law “infancy” rule34 and the statutory exceptions to it.35 They compared this test of legal capacity to the more flexible concept of client capacity in Model Rule 1.14, which Maryland’s highest court has adopted. It requires lawyers, “as far as reasonably possible, [to] maintain a normal client-lawyer relationship with [a minor] client.”36 The accompanying Comment suggests that, “to an increasing extent” the law recognizes “intermediate degrees of [client] competence,” which the lawyer should respect even when a client lacks “legal competence.”37 A client “as young as five or six years of age, and certainly those of ten or twelve, are regarded as having opinions that are entitled to weight in proceedings concerning their custody.”38

On the other hand, Rule 1.14 (b) authorizes a lawyer to request “the appointment of a guardian or take other protective action” when a paternalistic standard is met: “the lawyer reasonably believes that

33 See supra notes 4, 5 and 6.
34 The Maryland common law establishes the age of 21 as the age of majority and presumes that persons who are 20 years old or younger have impaired judgment. Recent decisions emphasize the rebuttable nature of the presumption. See, e.g., Jones v. State, 68 Md. App. 162, 166, 510 A.2d 1091, 1094 (1986) (the “test of a child’s competency is not age but the reasonable capacity to observe, understand, recall, and relate happenings while conscious of a duty to speak the truth.”)
35 For example, the Maryland Legislature has established that a child who is 10 years of age or older must give his or her consent to be adopted. See Md. Ann. Code, Fam. Law § 5-311(a)(3) (Supp. 1995).
36 Model Rule 1.14 (a); Md. Rule of Professional Conduct 1.14 (a).
37 Id., cmt.
38 Id.
the client cannot adequately act in the client’s own interest.”39 Tony did not appear to be acting in his own interest and he had no history of doing so. Therefore, why couldn’t the clinic seek the appointment of a guardian ad litem to make the educational decision for Tony?40 The students tentatively concluded that it might be possible to do so because Tony’s “ability to make adequately considered decisions” was “impaired” by both “minority” and “mental disability,” and Mr. Edwards’ decisionmaking ability also was “impaired” by “mental disability,” caused by alcoholism.41

As they analyzed the Rules, the students also considered whether there were persuasive reasons, grounded in moral reasoning, to trump Tony’s decision. There were. First, Tony’s awful “special school” experience made it impossible for him to imagine, and therefore to reasonably consider, the very different private educational opportunity that now was available to him. He simply had no factual basis to evaluate that opportunity.42 Second, the restriction on Tony’s autonomy would be limited; he could live at home and participate in the special education program during the day. He would not be required to move into a residential program. Third, the potential double injury Tony faced — an increased risk of confinement and continued illiteracy — was severe.43

These considerations, however, did not convince the students. During the course of the case, and particularly as the probation revocation hearing grew nearer, the students became stronger advocates for Tony’s position, in part because they had developed a closer relationship with him. In the end, the supervisor deferred to them, for reasons we will discuss shortly.44 The students developed a neighborhood school plan for Tony, which included a reading tutor and

39 Id., Rule 1.14(b).
40 See id.
41 Model Rule 1.14 (a); Maryland Rule 1.14 (a). The significant weaknesses in this analysis were the relatively limited degree of Tony’s impaired capacity, his relatively older age, Mr. Edwards’ support for his son’s position and the real (to Tony) concerns that supported Tony’s position, e.g., “special” education programs can stigmatize the “beneficiary,” and the special education program would be racially integrated (for Tony, a serious problem). In addition, if Tony remained opposed to the program, he likely would fail in it, bringing him back before the judge. See infra Part I(A)(3)(b) for the supervisor’s view about the possible impact of her reform goals on the students’ analysis.
42 One could argue, unconvincingly we believe, that these facts provided Tony’s “hypothetical consent” to the special education plan. David Luban and Deborah Rhode set forth, and then effectively criticize, the hypothetical consent justification for rejecting client autonomy. Deborah L. Rhode & David Luban, Legal Ethics 599-600 (1995).
44 See infra Part I(A)(3)(b).
presented it to the judge. Surprisingly, the judge accepted it. Tony had “won.” In her closing memo to the file, one of the students wrote:

As adults, our instinct was to seize control over the situation and convince Tony that he had to attend a more intensive education program. But, by what right do we have that authority? No one knows better than Tony the price he pays for his illiteracy — a price that includes alienation and limited participation in the daily routines of life. It is a price, however, that he is willing to assume at this point in his life.

But “how can Tony know the price of illiteracy,” the supervisor asks, adding that she hopes “Tony does not call me in five or ten years from his prison cell and ask me '[w]hy did you let me do that?' If he does, I hope that I will be able to explain it to him so that he will fully understand it.”

3. Analyzing Ms. Brown’s and Tony’s Cases
   a. Ms. Brown’s case
      i. Providing pluralism

What perspective (experience or vantage point) did the supervisor bring to the three ethical issues: (1) whether to assert Ms. Brown’s stay-at-home position (“paternalism” issue); (2) whether to conduct further investigation; and (3) how aggressively and persistently to advise Ms. Brown to execute the power of attorney? The supervisor had experience-based knowledge that was relevant to all three issues. The extent of Ms. Brown’s decisionmaking capacity, her reasons for wanting to live at home and her capacity to take care of herself, with in-home care, were relevant factors in making the paternalism decision.

From working with many prior clients, and as a result of obtaining and presenting expert testimony in prior cases, the supervisor knew much about the aging process and the ways in which elderly persons respond to it. She had evaluated the decisionmaking capacities of many clients. She knew the types of in-home care programs that were available and how clients like Ms. Brown had responded to these programs, and that many elderly persons attach great significance to apparently trivial decisions.

The supervisor also knew that if Ms. Brown’s lawyers did not zealously and effectively present her position to the court, it would

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45 The supervisor recently called Tony to see how he was doing. He had dropped out of his neighborhood school and was trying, like his father, to find day jobs to support himself. We knew that he had been arrested once after this because we had represented him at that trial. Tony said he had not been arrested since then.

46 For example, she had knowledge of the nature of dementia and that there is no bright line dividing the competent from the incompetent.
never be considered. From prior experiences with the DSS lawyer, the supervisor knew that he either personally gave little value to an elderly person’s interest in remaining at home, or believed he had a role-imposed obligation to vigorously challenge it. From experiences with the local court, the supervisor knew that the judge would likely reject the “least restrictive alternative” argument and appoint a guardian of person and property if Ms. Brown did not devise an adequate financial plan.

The supervisor’s conception of role was not always comfortable. She is “sometimes glad to lose cases in which I believe my client is making a self-destructive choice. I hope against hope that the petitioner will fully establish the case for guardianship because in my heart I do not want the client harmed by being left to her own devices, and I do not want the resulting harm on my conscience.” But, she says, “the fact remains that, although we generally make the arguments the clients want and sometimes win total, or more frequently partial, victories, I have never prevailed to the extent that the client was left in danger.” She concludes that “the adversary system does work in these cases, which is exactly why defense counsel should not abandon” the client’s arguments.

The supervisor also had case-specific knowledge, which the students had as well. This enabled the supervisor to apply her general knowledge to Ms. Brown and the factual and legal issues in her case.

The students did not provide much pluralistic balance within the clinical team. They had no case-specific knowledge that the supervisor lacked. The students had not developed a close relationship with the client. Nor had the supervisor. To the extent the supervisor’s rejection of paternalism was based on a personal value rather than her professional experiences, the stronger of the two students shared that value. The other student was not as forceful or effective.

Looking back, the supervisor notes that she “handled this case in the early months of my clinical teaching, when I was beginning to make the transition from lawyer to teacher. I would teach more carefully with the competing paternalism arguments today.” In Parts II and III, we suggest ways in which this missing pluralism might have been provided.

There was, however, a dialectical decisional process. Ms. Brown wanted no help. Andrew, at least initially, thought Ms. Brown ought to be in a nursing home. She wound up at home, but with a financial agent and in-home care. Much of the dialectical conversation was external to the clinical team. The legislature had engaged in the pluralistic conversation in enacting the “least restrictive alternative” provision of law. The DSS attorney was a forceful opposing advocate.
Ms. Brown had no effective choice other than to accept in-home care if she wished to remain at home.

The supervisor also had experienced-based knowledge that was relevant to the investigation issue. Like many clinical teachers, she had conducted factual investigations that produced critically important information that others had failed to discover in their investigations. Thus, in significant part, her investigatory standard was rooted in her experiences. Most students have not had investigatory experiences that might produce competing theories of investigation. Indeed, the inattention to facts and fact-finding in the classroom depreciates both. Clinical teachers often must affirmatively overcome this.

The students should have the primary responsibility for proposing, implementing and revising investigation plans. If, however, the supervisor believes the investigation has been inadequate, she should decide, directly if necessary, that the student should continue to investigate the matter.

ii. Deciding the ethical issue directly or indirectly

The supervisor was justified in making, in the more direct sense, the decision to assert Ms. Brown’s qualified stay-at-home argument for two reasons. First, the combination of the supervisor’s experienced-based and case-specific knowledge gave her a better basis for judgment. Second, the supervisor’s ethical decision was a better decision than Andrew’s; indeed, it was the best one, given all the facts.47 We argue later in this article that a supervisor might appropriately defer to a student’s judgment if the student has a better basis for making the judgment and it is a reasonable judgment.48 Those circumstances did not exist here.

We believe that the supervisor and students appropriately shared the responsibility for deciding that they should strongly advise Ms. Brown to execute the power of attorney. At the same time, we believe that the supervisor was right to directly execute that ethical decision by taking the lead in the client counseling session and modeling behavior. Maintaining a client’s confidence while forcefully giving her unwelcome advice is a complex art, particularly when a client is dis-

47 A straightforward construction of the law’s “least restrictive alternative” principle is that, before one may be involuntarily admitted to a nursing home, there should be some effort to test in-home care to see if that provides the needed care, unless there are clear indications it will not. There had been no such test in Ms. Brown’s case and there was no clear indication home-care would not work. Thus, the supervisor would have had to conclude that Ms. Brown was not entitled to exercise this legal right because it might not help her or it was a close question. These are extraordinarily expansive theories of paternalism.

48 See infra Part IV.
abled. It requires the lawyer to reassure the client, express empathy
and give strong advice, sometimes with intensity that can be confused
with rudeness. The line between strong but ethical counseling and un-
acceptable coercion can be very elusive. Its location may change mo-
mentarily and frequently during an intense, interactive counseling
session. We believe a clinical teacher should model behavior in situa-
tions like this. 49

b. Tony’s case

i. Providing pluralism

The supervisor in Tony’s case had a real-world understanding of
the adversary system. Unlike Ms. Brown’s case, however, the adver-
sarial check on Tony’s “neighborhood school” position was relatively
weak. If the clinic did not present the special education option, no
one else would. The school administrators were happy to go along
with Tony’s far less expensive idea. The prosecutor’s argument for
confinement would be weakened by the availability of a well-crafted,
special education alternative. The juvenile court judge had no special
education expertise; he adjudicated delinquency cases. Although the
judge was adamant that Tony must attend some school, unless the
clinic raised the special education alternative, he would not under-
stand that it existed. Thus, the supervisor’s experienced-based under-
standing of the adversary system supported intervening to present
the special education placement option to the court.

There were, however, more compelling reasons to defer to the
students’ judgment. The tripartite relationship in Tony’s case provided
real pluralism. The life experiences of the students provided balance
between the students themselves, and between the students (on the
one hand) and the supervisor (on the other).

In Tony’s case, the relevant experiences of the supervisor and stu-
dents were more balanced. The supervisor had general experience-
based knowledge of children and the juvenile law, but she did not
have particularized knowledge of the client. In significant part, the
ethical judgment in Tony’s case depended on personal evaluations
of Tony’s decisionmaking capacity, the strength of his commitment to his
position and his independence from his father. Tony’s student lawyers,
rather than the supervisor, had extensively interviewed, counseled and
developed a relationship with him. They were in a better position to
make the requisite evaluative judgments.

49 In Part I (B) infra, we advocate teaching by modeling in counseling sessions with a
client who was being subjected to harassing questions in a deposition because he was gay
and HIV-positive.
The students' relationship with Tony produced an *individualistic* notion of professional duty and a *here-and-now* sense of the client, which balanced the supervisor's more collective notion of duty and distant sense of the client. The supervisor described this balance:

As a reformer, there is the potential for disappointment in every special-education case that I handle in which the client, like Tony, does not want to enforce the special-education laws. I was especially frustrated in Tony's case because the school system's gross mismanagement of Tony's education gave him a particularly strong claim to a compensatory education.

The students and I had bifurcated the client. They had become the advocates for the Tony before them; I had become the advocate for the child that I hoped he might become. Their client existed. Mine did not. I wanted the school system to obey the law. Tony wanted to be with his neighborhood friends.

Of course, this personal relationship between student and client sometimes can produce excessive allegiance to the client: a Broughamic view that the client is the only "person in all the world." Tony's student lawyers, however, did not have this concep-

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50 *See infra* note 95. There are clinical students, of course, at the other end of the advocacy scale (which might be called the Pooh Bear pole), because they have developed in their classroom courses little sense of the partisan's role or because of their personality features, a lack of enthusiasm for their client and his or her cause, or for some other reason.

51 *Id.* Some support this super-allegiance with the "standard conception of the lawyer's role." *See* Gerald Postema, *Moral Responsibility of Professional Ethics*, 55 N.Y.U. L. REV. 63, 73 (1980). Others argue that providing special consideration to clients is to some degree intrinsically justified by the moral values of friendship. Charles Fried, *The Lawyer As Friend: The Moral Foundation of the Lawyer-Client Relation*, 85 YALE L.J. 1060 (1976). One of the primary friendship values, according to Fried, is the protection of autonomy. "The human concern which we then show others is a concern which first of all recognizes the concrete individuality of that other person just as we recognize our own." *Id.* at 1069.


One interesting question is whether the special circumstances of clinical practice partially rehabilitate Fried's special-purpose friend concept. One might argue that neutral partisanship is most justified when it protects the autonomy of the poor. The institutions that poor people deal with often extinguish individuality, whether it be the welfare department, public-housing project, public school or prison. Often indigent clients wish to challenge a federal or state statute or other governmental policy that regulates large groups of people. Often, the legal claim itself is that government did not individualize the decision, as it was required to do. If Fried intends "autonomy" to mean more tangible interests, the poor have the most compelling ones. What the poor seek, with our help, usually is food, shelter, personal liberty, health or life itself.
tion of their role.

Finally, the students had the intelligence and strength of personality to effectively present their views and to challenge the supervisor’s.

ii. Deciding the ethical issue directly or indirectly

The conversations in Tony’s case had a quality of third-party negotiations: students with Tony; and then students, on Tony’s behalf, with the supervisor. These conversations worked dialectically to produce the reading tutorial component of the neighborhood school plan. Explaining why she deferred to the students, the supervisor said: “They had more knowledge of Tony and had developed a personal relationship with him, which I would have destroyed if I disregarded their decision, and the issue seemed to be a close one.”

There are several factors in Tony’s case that supported supervisory deference to the student. The students’ case-specific knowledge was more relevant to the ethical issue than the supervisor’s general experience. The students had demonstrated their capacity for good judgment. The supervisor had a basis to conclude, and apparently did conclude, that the students’ ethical answer was reasonable (indeed, we think it was the best answer.) And, the students benefited educationally by more directly making the decision. They had developed an appropriate relationship with Tony, which they preserved by successfully asserting the right to more directly make the decision.

B. A Predicate to Acting Ethically: Learning and Understanding the Perspective of the Client

Students often must understand the perspective of the client in order to act ethically. Such understanding is essential, for example, to identify the client’s objectives or to help the client identify them;52 to identify the decisions that are reserved to the client;53 to effectively advise the client in making these decisions;54 and to otherwise practice competently55 and diligently (which includes the duty of zeallessness).56 The students’ ability to perform these discrete ethical duties often will depend upon their capacity “to see the world from the standpoint of the” client.57 Failure to learn and understand the cli-

52 Model Rules of Professional Conduct, Rule 1.2.
54 Id., Rule 2.1.
55 Id., Rule 1.1.
56 Id., Rule 1.3.
ent’s perspective can undermine the student-client bilateral relationship and prevent students from effectively presenting the client’s arguments to a decisionmaker. Thus, the ability to understand the client’s perspective may be an ethically required practice skill.

In the four case studies that follow, we give examples to support our assertion that understanding the perspective of the client often is essential to perform ethical duties. There is support for this assertion in the Model Rules as well. Rule 1.14 and the accompanying Comment, for example, suggest that lawyers have a duty to understand disabled clients as a means to protect the client’s decisionmaking right. Lawyers representing mentally ill clients must first understand difference to determine the extent to which their clients can “understand, deliberate upon and reach conclusions about matters affecting

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58 In describing what feminist theorists can (and do) bring to clinical education, Phyllis Goldfarb powerfully describes why difference may undermine a student’s ability to identify and achieve a client’s goals:

Clinic students’ perceptions, judgments, strategies, and communications as lawyers — the components of lawyering technique — may differ qualitatively from their clients’ perceptions, judgments, strategies, and communications. In part, these differences may result from the fact that law students typically come to clinics from different race, culture, and class backgrounds than their indigent clients. Students and clients also may differ on criteria such as gender, physical health, and mental health. These powerful socializing forces systematically influence what people come to know and understand about law, ethics, justice, and the world. As a consequence, the student lawyer’s knowledge, like all knowledge, is partial and value-laden, and by uncritically applying technical skills that do not account for such structural influences, the student lawyer will likely reproduce the dominant and distinctive world view at the expense of the client’s. Feminist thinkers would rivet their attention on the impact of professional interaction across powerful socially constructed divides.


59 By calling mutual understanding and tolerance “practice skills,” we do not mean to obscure the larger moral and human dimensions of these skills. We analyze them as “practice skills” because we believe that, even under the narrowest conception of ethical duties, students often are ethically required to develop these capacities. Although these practice skills are often employed defensively — to remove competence-imparing barriers — they are affirmative skills as well. They help lawyers identify how opposing counsel, decisionmakers, witnesses and others are “different” from them, which is the first step in enlisting the other as a cooperative partner or persuading the other. In a larger legal sense, developing these skills makes practice more personally fulfilling.

60 This understanding generally is required for effective client-centered counseling as well. See generally, Robert Dinerstein, Client-Centered Counseling: Reappraisal and Refinement, 32 ARIZ. L. REV. 501 (1990).
... [their] well-being.\textsuperscript{61} Indeed, the Comment compares lawyers for disabled clients to guardians, who plainly are obliged to seek to understand their wards’ differences and the reactions of others to those differences.\textsuperscript{62}

As we note in the Introduction, the differences between lawyers and clients can obstruct the lawyer’s ability to learn and understand the client’s perspective. We explain in the Introduction why we have chosen case studies from the AIDS workgroup to make our points about difference.\textsuperscript{63} In our AIDS workgroup, the supervisor identifies three interrelated steps students can take to overcome barriers caused by difference: (1) acknowledge difference and the potential responsive bias it may produce in oneself and others; (2) educate oneself, through readings and discussion, about the client’s experiences, including the views and actions of others that might be part of these experiences; and (3) most important, learn from the client in the context of his or her case.

\textit{Discovering One’s Stereotypes}

Brendan McConnell was a young, white student in the AIDS workgroup who came from an upper-class background. He had participated in an interviewing simulation that the clinic supervisor uses to help students identify their attitudes about difference, in part by making the kinds of mistakes that are typical of a first interview.\textsuperscript{64}

\textsuperscript{61} \textsc{Model Rules of Professional Conduct}, Rule 1.14.

\textsuperscript{62} \textit{Id.}, cmt. Recognizing this, the California Bar requires lawyers to take post-graduate courses about racial, gender, sexual orientation, age, religious and disability-based bias in the lawyer-client relationship. Katherine Bishop, \textit{California Lawyers Must Take Reference Course}, \textsc{N.Y. Times}, August 9, 1991, at B7.

\textsuperscript{63} \textit{See} Introduction \textit{supra}. There are other obstacles to understanding and action in our AIDS practice; for example, “counter-transference,” which social workers describe as unresolved and unrecognized issues the social worker (or attorney) has that interfere with the professional relationship. When students work with clients who are dying, their fear of their own mortality may interfere with professional obligations. One student came into the AIDS workgroup seemingly enthusiastic about the work and began working diligently on her cases. She seemed to have the capacity to develop excellent relationships with her clients. However, she made virtually no progress in any of her cases. She explained to her supervisor that she disengaged because she was worried her clients would soon die, and this forced her to face her death, which she could not do. The student’s work improved after the workgroup’s discussion of this problem, which was based on an article by two social workers: Joan Dunkel & Shellie Hatfield, \textit{Countertransference Issues in Working with Persons with AIDS}, \textsc{Social Work} 114 (March-April 1986). Social workers often help co-teach these classes, which give the students the opportunity to identify and begin to understand their reactive feelings.

\textsuperscript{64} Before conducting this interview, students read materials that provide background medical and psychosocial information about their prospective clients. These include, for example, Ruth Eisenberg, \textit{Practical Aspects of AIDS Litigation, in AIDS Practice Manual: A Legal and Educational Guide} (Paul Albert et al., eds., 3d ed., 1991); S. Shepperd, \textit{Medical and Public Health Overview of HIV Infection, in id.} at chap. 2-1. A medical
Students believe they are participating in the simulation to learn interviewing “skills,” more narrowly conceived. Indirection sometimes works better than direct self-conscious analysis of one’s potential prejudices.\(^{65}\) When students are put into role and compelled to act, they often disclose — by actions and non-verbal communications — fears they did not know they had. Students make mistakes they never would have predicted and that they immediately recognize as problematic.\(^{66}\)

In response to a second classroom exercise, in which the teacher asks students to identify both similarities and differences between themselves and the clients they have interviewed, Brendan disclosed a damaging stereotype.\(^{67}\) He described one client as follows:

Theresa Greene is a thirty-year-old, black woman who lives on North Patterson Park Avenue in a run down townhome with four children. She is a reformed drug abuser and came to us for advice in handling a possible confidentiality disclosure problem.

Upon my first meeting with Theresa I perceived her to be, to put it politely, inferior in social class and most of all, in intelligence, than myself — a pretty harsh analysis having never met the woman. I didn’t really know that I had formed this opinion until I remarked to someone later that she was very bright. She surprised me in many ways. She knew the system of welfare benefits better than I did, she was well educated as to HIV infection and had, I swear to God, good penmanship.

practitioner and a social worker from the University of Maryland Outpatient HIV clinic, with which we work, describe for the students the medical and the psychosocial challenges our clients face. Finally the students read and discuss books and articles that provide an introduction to the lives of disenfranchised people. The “Case of Mrs. G” (White, supra note 57) is excellent in this respect, as is Alice Walker’s story, “The Black Writer and the Southern Experience,” in In Search of Our Mother’s Gardens. See also Phyllis Goldfarb, supra note 58, at 1678-85 (1991). Nina Tarr makes some helpful suggestions about how literature can be useful in raising clinical students’ awareness of difference and the complex issues it may pose for them as lawyers. Nina Tarr, Current Issues in Clinical Legal Education, 37 How. L.J. 31, 47 (1993). Ideally, students would arrive in clinic with some prior exposure to the impact of racial differences on law, society and their prospective clients. See Frances Lee Ansley, Race and the Core Curriculum in Legal Education, 79 Cal. L. Rev. 1511 (1991).

\(^{65}\) Discrimination often is produced by unconscious motivations. We do not recognize the ways in which our cultural experience has influenced our beliefs about race or the occasions on which those beliefs affect our actions. In other words, a large part of the behavior that produced racial discrimination is influenced by unconscious racial motivation.\(^{\text{a}}\) Charles R. Lawrence, III, The Id, The Ego and Equal Protection: Reckoning with Unconscious Racism, 39 Stan. L. Rev. 317, 322 (1987).

\(^{66}\) These mistakes include assuming that clients are ill just because they are HIV-positive, assuming that family members know (or don’t know) the client’s HIV status, and inquiring about the source of the client’s infection.

\(^{67}\) Getting students to disclose is one point of this exercise. As Peggy Davis points out, it is difficult to change an attitude that is unacknowledged. Peggy Davis, Law as Microaggression, 98 Yale L.J. 1559, 1565 (1989).
I remarked to you later that week that she could easily have gotten herself out of that situation by simply choosing to get a job, or expecting more of herself than what she had accomplished. The difficulty of her situation is profound. She is a single mother of four children, has no job, and lives in only slightly better than disgusting circumstances. Yet, she relies on the social model of "housewife" to define her role and states flatly that her kids need her at home.

I don't know whether this reliance is out of a real belief that this is her role or if she uses it to justify her aversion to work. She is articulate, mentally quick, and reasonably ethical. She could be an asset to anyone willing to take the time to educate her to a trade.

Brendan's honesty encouraged other students to acknowledge similar feelings, despite their shocked reactions to some of what Brendan wrote.\textsuperscript{68}

Brendan ultimately developed a good relationship with Ms. Greene, in large measure because of his respect for her intelligence and her ability to survive in an incredibly harsh environment. The classroom exercise invited Brendan to identify his stereotype, but it was his personal contacts with Ms. Greene that debunked the stereotype.

\textit{Communicating Respect: A Second Step in Developing a Relationship of Trust}

Students must do more than understand difference; they must communicate that understanding to the clients. Some of our clients require some students to express this understanding \textit{before} they will provide the student with basic information about their legal problems. Usually, clients make the invitation in subtle (often non-verbal) ways and they expect the students to communicate their acceptance in the same way. This can be a very difficult two-way communication for client and student.

Donald Anderson was a gay African-American man. He was gregarious, often funny and irreverent. Like many other clients, he expressed his need for acceptance indirectly. Early in his interviews with the two sets of students who represented him sequentially, he described his love for the actor Patrick Swayze. The first student, a young, white, heterosexual woman, allowed herself to be diverted into a discussion of the actor's performance as a drag queen. She bantered with Mr. Anderson for a few minutes about Swayze. Reassured by her

\textsuperscript{68} These classes only work when the teacher can create an atmosphere of mutual respect and collaboration. The AIDS workgroup supervisor encourages students to support each other and to use the critique method honestly and constructively. To encourage others to be open, she tries to be open herself and to honestly describe, to the extent she can, how her preconceptions have interfered with her relationships with clients.
comfortable reaction, Mr. Anderson allowed her to steer the discussion back to the status of his case.

In the second interview, the students, a white woman and an African-American man, both of whom were heterosexual, expressed their discomfort in non-verbal cues. They ignored Mr. Anderson's comment and tried to "get down to business." Mr. Anderson tried again, by telling them about the "Mr. Maryland Leather" award he had received the previous year. The interview ended in mutual frustration. The students felt Mr. Anderson was being hostile. He believed they did not accept him. These students and Mr. Anderson never developed a relationship of trust and the students expressed more misgivings about the merits of his case than did the prior student. When Mr. Anderson lost his case and the students advised him that it would be fruitless to appeal (a conclusion the supervisor shared), he expressed a lack of confidence in their advice.69

In reflecting on these experiences, we have identified some new approaches to better prepare students to learn from their clients, like more carefully scripting the simulations to teach the sequence that we describe: (1) establish common ground, (2) understand difference and (3) communicate that understanding to the client. We are also thinking of asking clients with whom we have developed particularly good relationships to role-play the client in the simulated interview (and then to discuss the simulation with the students); or to videotape an interview between the supervisor and a client that models the communicative sequence. We intend to do some versions of these things in the future.70

Helping the Client to Defuse Bias from Other Actors in the Justice System

Dan O'Connor, a gay man, was raised by working-class parents in a small rural town. He was an intense man who passionately expressed both his joy of life and his frustrations. His employer required

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69 Admittedly, it is not atypical for one set of students to disagree with the prior evaluation of other students or for a client to refuse to accept well-founded advice he does not wish to hear. The supervisor in Mr. Anderson's case believes, however, that the students' failure to understand and accept Mr. Anderson's differences and to communicate that acceptance to him contributed to the student-client problems. In fairness to the students, it is important to note that Mr. Anderson's case had been transferred to a new supervisor, who had not developed a relationship with the client or represented AIDS clients before.

70 We recognize, of course, that a one, or even a two semester clinic does not provide sufficient opportunity to fully explore difference, particularly given all the other demands we place on students in a clinic. These lessons must be more fully integrated into the law school curriculum, including the first-year curriculum. This was one of the most important reasons the law school established the first-year Legal Theory and Practice courses. See supra note *.
that he be tested for HIV as a condition of his continued employment. After learning that the test was positive, the owner fired him and told Mr. O'Connor's co-workers and family that he was "dying of AIDS." Mr. O'Connor attempted suicide a few days later. After he recovered, the clinic filed an invasion of privacy claim in state court, claiming damages for both the forced testing and the disclosure of our client's HIV status.\(^71\)

In the course of deposing Mr. O'Connor, defense counsel asked a number of questions about his sexual practices and partners that both Mr. O'Connor, and to a significant extent the clinic team, thought were designed to intimidate the client, provoke him to say angry and damaging things, and persuade him that litigation wasn't worth the cost. This abusive strategy worked. Mr. O'Connor refused to answer the questions and stalked out of the deposition. The defendants filed a motion to compel discovery and we filed a motion for a protective order.

The conservative judge in the rural county in which we were forced to litigate the case angrily refused to allow the student to oppose the defendants' motion or to support Mr. O'Connor's motion with oral argument.\(^72\) For our purposes, the judge's denial of our motion was the beginning, not the end, of the story.

After the hearing, the students and supervisor met on several occasions with the client. They explained why he could not successfully appeal the judge's ruling. They advised Mr. O'Connor that, if he could answer the questions in a matter-of-fact manner, he would frustrate

\(^71\) The clinic also brought a successful employment discrimination case for the client, which we settled for full back-pay.

\(^72\) This was one representative colloquy, although the written words do not adequately communicate the judge's anger:

The Court: 
Who is opposing the motion [to direct] . . . the plaintiff to answer questions pertaining to sexual activities?

Mr. Winestock (Student Attorney): 
I am. We disagree with the defendants that these questions are relating to any of the relevant issues in this case.

The Court: 
And what makes you think that he doesn't have to answer questions about his sexual activities in this sort of case?

Mr. Winestock: 
We don't believe the plaintiff simply by bringing this suit gives up the right to his dignity in all respects.

The Court: 
This whole case is about sexual activity in one fashion or another.

Mr. Winestock: 
We disagree . . . .

The Court: 
That's the reason he got fired isn't it?

Mr. Winestock: 
The case arose and is related to the fact that Mr. O'Connor is HIV positive.

The Court: 
Sexual activities have nothing to do with AIDS?
the defendants' improper objective. But, helping Mr. O'Connor do this would require that the clinic team ask about his sexual history, to prepare his testimony on this point and to role-play a mock, abusive deposition. Both Mr. O'Connor and the students were apprehensive about taking these steps.

Mr. O'Connor eventually accepted the "be calm" strategy, but only after the clinical teacher intervened, reiterated and further explained the need for it, conducted the sexual history portion of the interview and began to role-play opposing counsel. According to the students, she was empathetic without being patronizing and forceful without being coercive. Tone was as important as substance. Simulations could not prepare the students to do what she did. Supervisory modeling, we believe, was an essential part of teaching ethics in this respect, as it was in Ms. Brown's case. Thereafter, one student further desensitized the examination by repeating the full litany of questions, from invasive to obnoxious, until Mr. O'Connor responded to them calmly.

At the continued deposition, Mr. O'Connor answered all of the defendants' questions unemotionally. The defendants immediately initiated negotiations, which concluded with a favorable settlement for Mr. O'Connor.

*Understanding the Client's Goals and Respecting His or Her Informed Decision About How to Accomplish Them*

When litigating, students must understand and respect the client's goal and must appreciate that "winning" in the traditional sense may be only one of several goals. The danger of a communication failure between client and attorney is particularly acute when the attorney and client have different cultural backgrounds.

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74 Clark Cunningham relates a case in which his client, who had been charged with disorderly conduct, was interested not only in beating the charge but also in exposing the white police officer's racist action in stopping the client merely because he was black. By narrowly focusing on the "legal" problem, Cunningham overlooked a general goal of his client. See Clark D. Cunningham, *The Lawyer as Translator, Representation as Text: Towards an Ethnography of Legal Discourse*, 77 *Cornell L. Rev.* 1298 (1992).

75 In describing "lawyers for social change," Gerald P. López identifies why students must often understand difference to identify their client's real objectives:

After all, the lives in which these lawyers intervene often differ considerably from their own — in terms of class, gender, race, ethnicity, and sexual orientation. Without laboring to understand these lives and their own entanglements with them, how else can lawyers begin to appreciate how their professional knowledge and skills may be perceived and deployed by those with whom they strive to ally themselves? How else can they begin to speculate about how their intervention may affect their clients' everyday relationships with employers, landlords, spouses and the state? And how else can they begin to study whether proposed strategies actually have a chance of
Ronald Peters came from a prominent family in a mid-size, predominantly white community. He was a bright man with a sardonic sense of humor. Homosexuality was incompatible with his family's religious beliefs. Mr. Peters had informed his mother and sister that he was gay, but had not disclosed his sexual orientation to others.

After his partner tested positive for HIV, Mr. Peters refused to be tested by the health department. At the agency's request, the local police pulled him over on his way to work and took him in handcuffs to jail. The jailers told Mr. Peters they would not release him until he "gave up his blood." He did, and when he received the results of this test, he learned for the first time that he was HIV-positive. He was angry and humiliated and sought the clinic's help. We filed a federal civil rights action on his behalf.

After preliminary fact-finding, the supervisor and students began discussing what testimony they should present in court. They focused particularly on evidence that would establish the emotional injury the episode had caused Mr. Peters. The students debated whether Mr. Peters' partner of three years should testify, given his knowledge of Mr. Peters' emotional state. He obviously had relevant testimony, but they were concerned that it would focus attention on the client's homosexuality and thereby possibly evoke a biased response from the federal jurors, particularly those who lived in the more conservative parts of Maryland. Mr. Peters' heterosexual sister could convincingly establish the injury, so why not let her be the witness?

For Mr. Peters, however, "hiding" was not an acceptable strategy. He had filed suit to regain his dignity. "Standing up" with his partner and describing the harm they had suffered was an essential part of redressing the injury.

The students learned from Mr. Peters why being open about his relationship was an essential part of reclaiming his dignity — which was his primary reason for filing the lawsuit. Mr. Peters understood the potential risk of alienating jurors, but he felt he could win them over with proper education. He was willing to take the risk. Mr. Pe-

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. . . Whatever else law schools may be, they have not characteristically been where future lawyers go to learn about how the poor and working poor live. Or about how the elderly cope. Or about how the disabled struggle. Or about how gays and lesbians build their lives in worlds that deny them the basic integrity of identity. Or about how single women of color raise their children in the midst of underfinanced schools, inadequate social support, and limited job opportunities. Indeed, in many ways both current and past lawyers fighting for social change and all with whom they collaborate (both clients and other social activists) have had to face trying to learn how largely to overcome rather than to take advantage of law school experience.

ters was the best teacher the students had that semester.\textsuperscript{76}

**PART II. STRUCTURAL QUESTIONS OF ROLE AND RESPONSIBILITY:**

**SELECTING PRACTICE SPECIALTIES, CLIENTS AND LEGAL WORK**

When we choose practice areas, legal work and clients, we produce the professional responsibility issues, and in the aggregate, the picture of the profession that we present to our students. We believe these selection decisions have significant untapped teaching potential.\textsuperscript{77}

We also exercise professional responsibility by, for example, distributing a scarce legal resource to some, but not all, of those who can not afford to purchase it. In the process, we express and model our conceptions of “the good lawyer.”

We argue that, in making these structural ethical decisions, we should engage in the same pluralistic method that we proposed in Part I for the more discrete decisions. In making this argument, we describe the many benefits and the one potential cost of our decision to represent people who are poor, we identify the respective interests and expertise of faculty and students in these decisions, and we suggest some ways in which this decisionmaking responsibility might be apportioned between supervisor, student and client.\textsuperscript{78}

\textsuperscript{76} Because the case was strong and well-prepared, the county offered a settlement and Mr. Peters accepted it.

\textsuperscript{77} Books on lawyering say little, if anything, about how practicing lawyers pick their clients. See, e.g., \textsc{Roger S. Haydock et al.}, \textsc{Lawyer: Practice and Planning} 6 (1996) (describing clients' expectations of their lawyers rather than lawyers' selection of clients). The clinical literature is also limited, saying less than it should about how clinical teachers and students select practice areas, clients and law reform projects. For some exceptions, see \textsc{Murray Teigh Bloom et al.}, \textsc{Lawyers, Clients and Ethics: Using the Law School Clinic for Teaching Professional Responsibility} (1974). For related material that is not clinic-based, but generally addresses the ethical implications of choosing clients, see \textsc{James E. Moliterno & John M. Levy}, \textsc{Ethics of the Lawyer's Work} 103-04 (1993); Michael Davis, \textit{The Right to Refuse a Case}, in \textsc{Ethics And The Legal Profession} 441 (Michael Davis & Fredrick A. Allision eds., 1986); \textsc{L. Ray Paterson}, \textit{The Lawyer and The Potential Client, in Professional Responsibility: A Guide for Lawyers} 19-42 (Davidson Ream ed., 1978); Monroe H. Freedman, \textit{Ethical Ends and Ethical Means}, 41 \textsc{J. Legal Educ.} 55, 56 (1991); Symposium, \textsc{Clinical Legal Education: Reflections on the Past Fifteen Years and Aspirations for the Future}, 36 \textsc{Cath. U. L. Rev.} 337, 362 (1987) [hereinafter Symposium] (arguing that it is important for clinicians to write about “what lawyers do in their offices,” such as how we select clients).

\textsuperscript{78} This decisionmaking may be affected by a threshold problem if the clinic is funded for some designated projects. Yet the clinical teacher and students still may have some discretion to choose practice specialties or subspecialties, to select groups of clients or individuals within groups, and to make other important selection decisions. Even in restrained form, these are important ethical judgments. For analysis of the potential conflicts between the goals of clients and attorneys, see \textsc{Derrick A. Bell, Jr.}, \textit{Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation}, 85 \textsc{Yale L.J.} 470 (1976) (analyzing the respective interests of lawyers and their clients in school desegregation cases).
A. The Importance of Representing the Poor and Other People Who Cannot Otherwise Obtain Legal Help

Most, if not all, clinical programs represent people who are poor or cannot otherwise obtain legal help. The case for these selection decisions is familiar and compelling. We are sometimes so comfortable with the basic decision, we forget that we make a conscious choice of legal practice. In our clinical law offices, we could represent anyone — businesses, middle-income families, affluent individuals — and accomplish some of our educational goals, while generating the types of fees that help to subsidize clinical education in medical schools. From the standpoint of some career-focused law students, this approach would be enormously popular. As one clinician starkly confessed: "[I]f we opened up a Covington & Burling Clinic in the law school, it would be immediately over-subscribed."

By representing those who cannot obtain legal help, we teach about and fulfill our ethical duties as lawyers and respond to shrinking legal services budgets and onerous case restrictions. We also

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81 See Symposium, supra note 77, at 347. Professor Phil Schrag notes that "[n]either clinics nor law schools nor universities can solve the problems of careerism and survival psychology." Id. at 346-47.

82 Id. at 359.


84 Mike Ervin, How the President Helped Crush the Concept of Equal Justice, BUFFALO NEWS, May 28, 1996, at B3. "Legal Services lawyers can no longer challenge any welfare laws, policies, or reform initiatives. They can no longer seek payment of attorneys fees from the opposing party, even if such payment is permitted by statute. They can no longer take part in cases involving abortion, nor can they represent prisoners in federal, state, or
introduce students to work that fully engages their “intellect, emotion, stamina, imagination, and tolerance.”

Our work links students to our civil rights and poverty law traditions, while helping them to understand the relationships between law, race and poverty. Our work also helps students develop basic practice competencies.

In justifying our predominate choice of clients, we assume there is room within our practice specialties to give our students effective visions of how they might integrate “public interest practice” into a private practice. A consumer law practice for the poor in a clinic, for example, could show students how they might design future practices to “do good” and “do well” (redefined to mean paying one’s educational loans). This clinical practice would introduce students to class actions and other forms of group representation that generate attorneys’ fees from “common recoveries,” and the use of fee-shifting statutes to pay for a more individual-client consumer practice. Similarly, a disability law practice can generate fees in special education and social security disability cases. Such specialties also introduce students to ethical issues that arise most directly in a private practice, such as the powerful, but largely ignored, conflicts of interest that the economics of practice generate.

Providing students with private practice models is as important to the poor as it is to students. With the current Congressional assault on the legal services ideal, many of our students will need or want to express their “public” instincts in private practice, particularly in small local jails.”


or solo "people's practices."90 If we do not show them in our clinical law practices how they might do so, they will find it much more difficult to establish these practices.

B. The Interests of Clinical Teachers and Students in Legal Work Selection Decisions

The choice of legal work is among the most important "moral statement[s] that lawyers make."91 In making those selections, we ask and answer central questions about a lawyer's role. We do so with scant help from the Model Rules, which say little about why a lawyer should accept any particular clients, or even a client who, without that lawyer's help, will not be able to protect his life, liberty or property.92 Providing such legal help is an important tradition of the profession that we, as teachers, should communicate to our students, many of whom are unaware of it.93 For instance, one law professor94 known

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90 We can also attempt to develop connections between public interest and private practice through economic and housing development transactional practices (which include attorneys' fees in closing costs), criminal defense work, domestic practice and a number of other traditional clinic specialties.


92 See Richard A. Zitrin & Carol M. Langford, Legal Ethics and the Practice of Law 46-73 (1993). The Model Rules contain a diluted and implicitly stated version of this value. See Model Rules 1.2, 6.1 and 6.2 (stating that "[a]ll lawyers have a responsibility to assist in providing pro bono publico services . . . . An individual lawyer fulfills this responsibility by accepting a fair share of unpopular matters or indigent or unpopular clients.") The drafters of the Model Rules did not, for example, preserve the canon stating that "a lawyer should not decline representation because a client or a cause is unpopular or community reaction is adverse." Model Code of Professional Responsibility EC 2-27 (1980).

93 The drafters of the Model Rules, however, eliminate their predecessors' reference to this tradition. Model Code of Professional Responsibility EC 2-27 (1980) provided: "History is replete with instances of distinguished and sacrificial services by lawyers who have represented unpopular clients and causes." EC 2-28 said a good lawyer should not refuse a client because it will result in "adversary alignment against judges, other lawyers, public officials, or influential members of the community." Luban and Millemann note that "[t]hese aspirations simply vanish from the Model Rules, which replace them with a rule stating that a lawyer 'shall not seek to avoid appointment by a tribunal to represent a person except for good cause . . . ."' Luban & Millemann, supra note 5, at 50. The deleted provisions suggested "that professional honor takes guts"; the Model Rules, "by contrast, don't offer the slightest suggestion that a lawyer should feel ashamed of turning away a client out of a lack of nerve." Id. For instance, although the Model Rules suggest that legal representation should not be denied to "people . . . whose cause is controversial or the subject of popular disapproval" (Model Rule 1.2), the lawyer may withdraw from representing a client "if the client insists on pursuing an objective that the lawyer considers repugnant or imprudent." Model Rule 1.16(b)(3).

94 Professor Michael Tigar is viewed by some clinicians as a modern version of Atticus Finch. See Harper Lee, To Kill A Mockingbird (1960).
for his representation of unpopular clients contends that “lawyers must be free to respond to their own conscience for the kinds of clients they choose to represent and the positions they choose to advance,” referring to “[t]he lawyers who have upheld that principle, from Sir Thomas More to Lord Brougham to Clarence Darrow.”

Many of our students come to law school to explore just such questions of role. Is a lawyer a neutral technician who expresses herself only in the tangible craft of lawyering, or perhaps through the more abstract idea of implementing the law and participating in the adversary system? Or does a lawyer express himself, politically and philosophically, through the clients and cases that he chooses?

Although we discuss these questions in the classroom, we ultimately answer them by acting: making decisions. We believe in the clinical methodology. It follows that we should invite our students to act as well. But, in what ways and how?

There are good reasons to continue to give clinical teachers substantial selection discretion. When we practice in our areas of interest, we are more likely to be good lawyers and teachers.


[An] advocate, in the discharge of his duty, knows but one person in all the world, and that person is the client. To save that client by all means and expedients, and at all hazards and costs to other persons, and, among them, to himself, is his first and only duty; and in performing this duty he must not regard the alarm, the torments, the destruction which he may bring upon others. Separating the duty of a patriot from that of an advocate, he must go on reckless of the consequences, though it should be his unhappy fate to involve his country in confusion.


For alternative perspectives on the degree to which lawyers should be morally accountable for their decisions about which clients to represent, see Monroe H. Freedman, Must You Be the Devil’s Advocate?, Legal Times 19 (August 23, 1993), reprinted in Cochran & Collett, supra at 29-32, 35-36, (1996) and Monroe H. Freedman, The Morality of Lawyering, Legal Times 22 (Sept. 20, 1993). Although Professor Tigar may have had the better of this particular exchange as even Professor Freedman seems to acknowledge (Freedman, The Morality of Lawyering, Legal Times (Sept. 20, 1993)), few clinicians would be indifferent to the infliction of needless harm to third parties.

96 Compare Stephen L. Pepper, The Lawyer’s Amoral Ethical Role: A Defense, A Problem and Some Possibilities, 1986 Am. B. Found. Res. J. 613 (presenting a strong defense of the lawyer’s amoral role but still acknowledging that the lawyer who adopts that role retains “the choice of whether or not to accept a person as a client”) with Joseph Allegretti, Have Briefcase Will Travel: An Essay on the Lawyer as Hired Gun, 24 Creighton L. Rev. 747, 777 (1991) (arguing that lawyers should not hide behind the mask of the “amoral technician”; instead, lawyers must “assume the burdens of the moral life, and take responsibility for their actions”).

choosing our practices is also likely to enrich our scholarship and public service. Perhaps most important, in making a practice choice, we express much of what we value in ourselves.\textsuperscript{98} We teach some of our best ethics classes when we present, challenge and defend the position that, in choosing clients, lawyers do and should express their own political, philosophical and moral values.\textsuperscript{99}

However, the autonomy interests of students are important as well. They may perform better and express themselves in important ways, as we do, if they have some role to play in choosing their legal work. In our law school, the students’ interests are heightened by our requirement that they take either the clinic or another experiential course to graduate.\textsuperscript{100} Or in addition, they may want to learn about

\textsuperscript{98}For example, one of the article's authors is an advocate for persons with disabilities and persons who are homeless. This work provides him with excellent materials for teaching, scholarship and public service at various governmental and nonprofit levels. Furthermore, clinicians in this field regularly confront tough ethical and public-policy issues as they seek to represent these often marginalized individuals and groups. The attorney-client relationship can be complicated. Although the majority of the 49,000,000 Americans who have mental or physical disabilities are competent to establish a “normal” client-attorney relationship, many others cannot. They are cut off from our justice system by institutionalization, ward status, extreme poverty, cognitive or emotional limitations or their lack of familiarity with lawyers and legal problems. Persons with mental retardation are a classic example of a group whose members face these barriers to justice. Stanley S. Harr, \textit{The New Clients: Legal Services for Mentally Retarded Persons}, 31 STAN. L. REV. 553 (1979). Even when attorneys are willing to represent persons with severe disabilities, attorneys face unique problems in establishing, maintaining and terminating the attorney-client relationship. Stanley S. Harr, \textit{Representation of Clients with Disabilities: Issues of Ethics and Control}, 17 N.Y.U. REV. L. & SOC. CHANGE 609 (1989-90).

\textsuperscript{99}Every practice area is professionally challenging if the lawyer aspires to a standard of excellence rather than bare competence, exceeding clients' expectations not just meeting their needs. See Joel F. Henning, \textit{Quality Assurance: Much More than Minimizing Malpractice, in The Quality Pursuit: Assuring Standards in the Practice of Law} 4 (R. Greene ed., 1989). Henning states:

\begin{quote}
the standard of excellence goes beyond mastery of professional knowledge and skill. It goes beyond merely helping clients, responding to their needs and protecting them from their adversaries. The standard of excellence means working with each client to create and carry out strategies for succeeding in the client's arena — not the lawyer's.
\end{quote}

\textit{Id.}

\textsuperscript{100}For the views of two politically active lawyers who espoused self-expression through client selection and law reform, see \textit{William M. Kunstler with Sheila Isenberg, My Life as a Radical Lawyer} (1994); Ralph Nader, \textit{Ralph Nader Asks Law Students to Change}, 45 N.Y.B.J. 316 (1973).

\textsuperscript{100}To respect student autonomy, we ask students to indicate their course preferences.
particular practice specialties because they wish to explore or develop careers in these areas.\textsuperscript{101}

1. The Clinical Supervisor's Selection Expertise and Role

In what ways do clinical teachers possess special ethical expertise in making selection decisions? From experience, we have a sense of the whole. We understand, if not the universe, the educational stars in our galaxy. We know what it is that students might learn in a clinical course and whether our practice choices will respond to public service goals and unmet legal needs in our community.

From experience, we also understand the limits of the law. We have a sense of what is achievable and the realistic strategies — litigation, legislation, rulemaking or public policy advocacy — to carry out reform goals.\textsuperscript{102} We also have the opportunity to engage in law reform work in ways students cannot.\textsuperscript{103} Many students begin and conclude their clinic experience in three months, but even a seven or eight-month clinical experience does not allow students to see a protracted law reform matter to its end. Given their limited time in clinic and their desire to "do a hearing," some students may become impatient with long-term strategies to achieve systemic goals. Students who are interested primarily in skills acquisition, for example, may question the value of three months of fact investigation or legislative advocacy that provides limited courtroom or client experiences.\textsuperscript{104}

Other students and the faculty, however, may prize law reform. One experienced clinical teacher has referred to the reform mission of clinical education as the meta-ethics of the field.\textsuperscript{105} The central idea

\textsuperscript{101} We can usually accommodate the students' first or second choices by offering them a wide variety of clinical courses. For the range of those courses, see supra notes * and 11.

\textsuperscript{102} See, e.g., Marc Feldman, Political Lessons: Legal Services for the Poor, 83 GEO. L. J. 1529, 1537-39 (1995) (challenging the conventional legal services dichotomy between service and law reform cases and making a counter-proposal that all cases, including "low-level" actions in which there is coordination of effort and aggregation of claims, could lead to real change").

\textsuperscript{103} For a positive assessment of the teaching potential of such cases even when students engage in only slices of them, see Roger Wolf's comments in Symposium, supra note 77, at 354.

\textsuperscript{104} On the other hand, a student may become star-struck with the idea of turning a custody dispute into a major case when the client's goal is much more narrow. See Bloom, supra note 77, at 22-29 (describing such a case handled by students enrolled in a clinic in the East Bay area of San Francisco).

\textsuperscript{105} See Dean Hill Rivkin's comments in Symposium, supra note 77, at 340. Rivkin further argued that after the clinical movement established itself, many of the reform ele-
of using legal education as an insurgent movement for change emanates from the early days of clinical legal education.\textsuperscript{106} The idea is as viable today, although the law reform projects themselves may not be as consistently successful as they were twenty-five years ago.\textsuperscript{107}

There are good arguments that the clinical teacher, who must live for years and sometimes decades, with the consequences of a law reform choice, should make the ultimate decision. Nonetheless, there are important classroom and practice roles for students. For example, identifying the appropriate criteria for the selection of cases should be a key topic on our educational agenda.\textsuperscript{108} The supervising attorney should elicit students' opinions and challenge student attorneys to de-

\textsuperscript{106} See, e.g., William Pincus, A Small Proposal for a Big Change in Legal Education, 1970 U. TOL. L. REV. 913, 916 (arguing that clinical involvement by law students will help "society provide more and better legal services to those who need them"); Stern, supra note 79, at 214, 217-18. Stern argued that law schools, through clinical programs and other resources, should make "significant contributions . . . in traditionally underrepresented and underscrutinized areas" for poor and middle-income persons. Id. Stern also stressed the importance of law-reform activities such as group representation of community organizations, lobbying for legislative action, initiation of law reform cases and assistance to government agencies in their reform efforts. Id. For a description of early debates about the extent to which clinical legal education could be a tool to change traditional legal education and practice, see Bloom, supra note 79, at 115-29.

\textsuperscript{107} Some of today's most important law reform projects will be defensive. Again, using our disabilities and homeless persons workgroup as an example, in recent years we have had to respond to federal and state actions by: (1) helping to form the Maryland Disabilities Action Coalition to restore a State disability benefits program that had been eliminated from the State budget; (2) presenting testimony to Congress to preserve basic due process rights under the Individuals with Disabilities Education Act; (3) lobbying for a State law that precludes persons with mental retardation from suffering capital punishment; and (4) petitioning the Board of Law Examiners to revise the questionnaire for bar candidates to comply with the Americans with Disabilities Act. At the same time, reformers must act affirmatively if they wish to help set reform agendas. We have, for example: (1) lobbied in support of legislation to expand community-based services for persons with developmental disabilities; (2) lobbied to reduce a juvenile correctional facility with decentralized services; (3) represented a class of all inpatients in State mental hospitals to ensure their ongoing access to independent legal counsel; and (4) supported legislation to create a new municipal program for services to the homeless.

\textsuperscript{108} One particularly fruitful class led to the formulation of the following list of broad criteria for the selection of cases:

1. Systematic impact on clientele
2. Pedagogical value
3. Ability to help the individual
4. Available space on our docket
5. Meritorious claim
6. Consistent with work group specialization
7. Lack of client resources
8. Lack of alternative sources of legal assistance
9. Our competence to handle the matter
10. The "X" factor (attractiveness, or novelty of the issue; compelling needs or vulnerability of the client).

Memorandum to Clinic File from Stanley S. Herr, September 6, 1991.
fend their case selection judgments on moral and ethical grounds.

Clinical teachers, therefore, have a large role to play in identifying the educational merit of legal work, the public need for that work, law reform goals and realistic strategies to achieve them.

2. The Student's Selection Expertise and Role

Students come to law school and the clinic with their own values, aspirations and moral beliefs. The students' views may be particularly important when they do not coincide with the teacher's. This produces critical joint analysis of the decision-making process. The goal of this important conversation is not to impose values, but rather to deepen the students' understanding of the professional responsibility issues involved in selection decisions and the underlying competing visions of lawyer accountability and distribution of legal services.

a. Micro-Selection Decisions

Students can play a substantial role in our selection of individual clients by conducting initial interviews, identifying the basic facts and client's goals, making necessary evaluations based on the clinic's selection criteria and making recommendations to the supervising attorney. In performing these functions, the student's vantage point and case-specific experiences may be somewhat akin to those they have when they represent a client.109

It is, however, important to identify potential sources of bias. For example, a student whose sister was killed by a drunk driver might find it very difficult to reasonably consider a request for legal representation from an alcoholic who is a defendant in a drunk driving case. In analyzing student interest, we distinguish case acceptance decisions from case assignments. It may be appropriate to allow the student to refuse personally to defend the drunk driver, while concluding that the student has no justification for denying that defendant the representation that would be provided by another student. A very limited "opt-out" policy for case assignments might be ethically justifiable, particularly when a law school requires a student to participate in a clinic.110

109 See supra Part I(A)(3)(b) (discussing Tony's case).
110 See supra note * for a description of the experiential course requirement at our law school. Arguments in support of such an opt-out provision might closely track David Luban's justifications for substitute service in a mandatory pro bono system. See DAVID LUBAN, LAWYERS AND JUSTICE: AN ETHICAL STUDY 279-80 (1988). Thus, our hypothetical student in the drunk driving case might be justified in refusing to defend that client, but not in refusing to assist any client who has a substance-abuse problem or conditioning representation of alleged drunk drivers on the client's willingness to enter an in-patient alcohol treatment program. We acknowledge, and to varying degrees accept, the strong
A clinical teacher, however, might consider a student's request to refuse a case assignment as an educational signal that the student may need to experience precisely what he seeks to avoid: to represent a client who is different from him, or who is difficult, or who wants — and has a legal right to — assert a position with which the student disagrees.

In developing subspecialties, clinical teachers can accommodate student interest and respond to students' goals. For example, the supervisor of the disability law workgroup agreed to the request of a student, who had been a special education teacher, to work on a major special education case and testify before Congress on the Individuals with Disabilities Education Act. Clinicians may wish to interview their students or poll them for their preferences before making case assignments.

b. Macro-Selection Decisions

Another source of student selection perspective is life experience. Students may derive from their experiences before and during law school a unique perspective on the question of which legal needs the clinic should address and how it should address them.

Moreover, when the experiences of the students are similar to those of potential clients, the views of these students may serve as partial proxies for the views of potential clients whom we do not serve, notwithstanding the students' differences from most clients in educational background and legal training, among other characteristics. The students' experiences are particularly important when clinical faculty members have not had those experiences. In the examples of selection decisions that we offer below, we responded, at

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arguments against opt-out provisions. Moreover, there may be room for responsible "give and take" after the case has been assigned as to the scope of the student's responsibilities on the particular issue.

111 It is also educationally important, however, to engage students in legal work with clients, facts and issues that are new to them. This special education teacher also worked in new disability areas, achieving impressive results for his clients. Ultimately, he not only won a law school prize for his excellent work; he used the praise that an impressed hearing officer wrote into his opinion to help secure a summer job in a law firm specializing in education law.

112 We do not offer the selection perspectives of students as a full (or even major) substitute for the selection perspectives of clients. The respective interests of these two groups are not identical and may sometimes conflict. For these reasons it is essential that clinical teachers directly assess the unmet legal needs of potential clinic clients. This should be done formally, with legal needs studies, or informally, with such means as maintaining a physical presence in the communities that the clinic serves, soliciting information from representative community groups and talking regularly to the people whom the poor approach when they have problems (such as clergy, the local legal services program, community police officers and local community leaders).
least in part, to the life experiences and vantage points of students who were raised in poverty, students of color, women, older students who have had pre-school work experiences and students who have diverse viewpoints.

C. Striking the Balance Between Competing Autonomy Interests and Perspectives

We have already described a variety of steps that we have taken to accommodate the interests and perspectives of students, including providing a broad array of experiential courses, giving students a substantial role in individual case-acceptance decisions and developing new or expanded subspecialty practices. And, if it is possible to develop a new clinical position in a new practice area in a way that responds to the students' interests and perspectives, the students' voice should weigh heavily in the hiring decision.

But, what if students have good educational reasons for urging a clinic that is in a "no-growth" period to adopt a new practice specialty and that specialty would provide important legal services that the community clearly needs, but no existing clinical faculty member has a substantial interest in that practice area? One possible response is to politely decline to develop the new specialty, explaining that there is no objective basis to prefer a new group of poor clients to an existing group and that faculty autonomy produces important educational benefits for the students. However, one can just as readily argue the other side: the students may be right that the type of legal services they recommend are more important to the poor than other types and that their proposed clinic meets an important educational need that is not being satisfied.

One possible way to respond to this conflict of interests and judgments is to experiment with new, less expensive clinical models that make creative use of practicing attorneys, adjunct clinical teachers (by which we mean practicing attorneys who are part-time teachers or supervisors), post-graduate fellows and other types of part-time clinical teachers. We briefly describe some of our experiments, not to debate or evaluate their merits, but to indicate some ways in which we have struck balances between competing interests. Indeed, we acknowledge the differences among clinicians, which we have among ourselves, about the respective merits of in-house clinics and externships. There are helpful conceptions of models that are

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113 See supra notes 6 and 11.
114 See supra notes 97-99 and accompanying text.
115 We need not revisit here the familiar "in-house" versus "externship" debate. For over twenty years that debate has appeared in law review articles. See, e.g., Minna J.
neither exclusively “in-house” nor “externship,” but a consolidation of the two approaches.\footnote{See, e.g., Stephen Maher, The Praise of Foley: A Defense of Practice Supervision in Clinical Legal Education, 69 Neb. L. Rev. 537 (1990) (comparing in-house clinics, “case supervised” externships, in which a clinical professor has some responsibility for individual case decisions, and “practice supervised” externships, in which a professor retains only general monitoring responsibility, and concluding that the latter have untapped educational potential); Robert Seibel, Field Placement Programs: Practices, Problems and Possibilities, 2 Clin. L. Rev. 413 (1996) (presenting the results of a nationwide survey of externship programs and describing the diversity of models).} We emphasize that the four projects we are about to describe are at neither pedagogical pole but at different points between the poles, and a full-time clinical teacher was involved in, primarily developed and co-taught (in varying ways) each of these hybrid workgroups.\footnote{The full-time clinical teacher (“faculty member”) and one to three adjunct clinical professors (“adjunct”) divided the teaching and practice responsibilities for each of the workgroups. Although each workgroup was different from the others in some ways, they had common features. The adjunct faculty member assumed primary responsibility for supervising the students’ legal work in court (or in other formal settings) and in the adjunct’s law office. That adjunct was either a practicing lawyer in a public law office (most frequently) or a staff member of the law school. The adjuncts usually assumed substantial responsibility for teaching the relevant body of substantive law and some of the practice-specific skills. The faculty member primarily designed the clinical workgroups, approved the selection of legal work, designed the classroom component (which always included weekly seminar-type classes) and taught or co-taught those classes. These classes used the students’ fieldwork experiences to teach recurring professional responsibility issues as well as skills, substantive law, public policy and other issues. The faculty member also taught a concentrated skills component early in the semester. Most significantly, the faculty member supervised the legal work of the students in two ways. First, he met weekly with students in their four to six person workgroups. In connection with these meetings, he reviewed students’ written case plans, which permitted monitoring of both the students’ execution of their case plans and the adjunct’s supervision of the students. Second, he required the students to meet any formal performance (usually a hearing or trial) significantly in advance of it. This helped students make mid-course corrections in their case preparation. These two sets of supervisory sessions provided the faculty member with an inventory of the students’ experiences, which he then selectively used in the class, along with assigned materials, to integrate theory and practice. For discussion of the advantages and limits of involving adjunct faculty in clinical programs, see N.Y. Professional Education Project, Legal Education and Professional Development in New York State 29-30 (1996); American Bar Association Section of Legal Education and Admissions to the Bar, Report of the Commission to Review the Substance and Process of the American Bar Association’s Accreditation of American Law Schools and Supplementary Report 24, 26 (1995) (“Wahl Commission”).} Although we developed these hybrid workgroups in a two-year period, students had expressed interest in these specialties for several
years. Other law schools, in substantial and increasing numbers, offer three of the four types of clinical workgroups that we describe.\textsuperscript{118} In addition, the full-time clinical teacher who primarily developed these projects concluded that they were educationally sound and would provide needed legal services to the poor. These factors seem to us to be reasonable bases for accommodating students' selection perspectives without falling into the trap of lurching from project to project as student interest waxes and wanes.

\textit{Economic, Housing and Community Development Practice Workgroup}

We created an economic, housing and community development ("EHCD") practice workgroup partly in response to the advice of African-American students and an African-American faculty member.\textsuperscript{119} They urged the clinic to represent community groups in African-American communities, particularly those communities in which the Law School is located. Several of the key student leaders grew up in poverty. Based on their life experiences, they thought an EHCD workgroup would respond directly to the most pressing problems of the poor. The workgroup now provides economic development, housing redevelopment and nonprofit corporate legal services in inner-city neighborhoods. This project is the clinic's first transactional practice specialty, although many of us incorporate transactional experiences into our workgroups as well.\textsuperscript{120} In response to the strong support of the African-American communities in which we practice, the University recently created a full-time clinical position for the EHCD workgroup, which will allow us to move it more substantially in-house.

\textsuperscript{118} The exception is the Family Law Assisted Pro Se project. See infra notes 121-24 and accompanying text.

\textsuperscript{119} Sherrilyn Ifill teaches in our Legal Theory and Practice (LTP) program. See supra note *. She has developed LTP\textregistered Civil Procedure and LTP\textregistered Environmental Justice courses in which she and her students provide legal assistance to African-American groups outside of Baltimore City who face discrimination from local jurisdictions.

\textsuperscript{120} For a description of how clinics elsewhere have also expanded from litigation-centered to transactional work, see Peter Pitgoff, \textit{Law School Initiatives in Housing and Community Development}, 4 B.U. PUB. INT. L. J. 275 (1995); Ronald Slye, \textit{Community Institution Building: A Response to the Limits of Litigation in Addressing the Problem of Homelessness}, 36 VILL. L. REV. 1035 (1991). Leslie Newman describes community economic development clinics at a number of law schools including the pioneering law schools. Leslie Newman, Law Schools and Community Economic Development (The National Economic Development and Law Center) (1993) (unpublished manuscript). As the clinical teachers know who have offered these types of clinics for longer than we have, teaching with transactional legal work often is difficult because it is legally complex and protracted, and sometimes is dependent on organizational harmony that may not exist. We are learning, however, to identify excellent educational opportunities in these clinics and the work is personally satisfying when it produces tangible results and community spirit.
Child Abuse and Domestic Violence Prosecution Project

We developed our child abuse prosecution project in response to student interest and perspective. Four women students who were interested both in protecting children and being prosecutors did much of the work of developing the project. Among other topics, this workgroup has introduced students to the important professional responsibility issues associated with prosecutorial discretion. We recently hired a new tenure-track professor to assume responsibility for this workgroup, moving it a significant step closer to our in-house model.

Family Law Assisted Pro Se Project

We created this courthouse-based project to provide diagnostic interviews, limited counseling and referral services to pro se parties. We did so in response to general student demand for family law clinical experiences, the client community’s pressing legal need, our desire to test the “assisted pro se” approach, and available funding specifically designated for this purpose. The law school hired two adjunct clinical professors to provide much of the project supervision and to co-teach the classroom component with the full-time clinical teacher.

To an extraordinary extent, participating students helped to develop this project. The student leaders were all women. Several had deep interests in addressing legal issues involving children. Four of the five had substantial work experiences before they entered law school. These students helped to make structural professional responsibility decisions that usually do not arise in established clinical practices. The project is a fascinating legal services laboratory.

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121 They helped develop the workgroup’s substantive law materials, prepared “self-education plans,” established small seminar groups, taught each other major parts of the law they needed to know, and helped develop client-acceptance policies, limited-services retainer agreements and other operational protocols. They met with judges, clerks and representatives of groups to refine the project in response to various growing pains. They helped design a project evaluation instrument and, working under the direction of an independent evaluator, gathered much of the information necessary to conduct the evaluation. They also recruited and trained the generation of clinical students who replaced them.

122 We had to determine whether to establish attorney-client relationships with everyone with whom we met (we decided to do so when we gave advice but not when we provided only legal information), the distinctions between “legal advice” and “legal information,” what types of clients we were going to represent (and why), what types of claims we were going to help them with (and why), the extent of the counseling services we would provide, the ethical implications of “unbundling” legal services, how to design and implement a conflicts of interest policy that could immediately check for conflicts with other limited-retainer clients and the clinic’s regular clients and the meaning of lawyer “competence” in this limited representational context, among many other things.

123 The clinical teacher and adjunct professors are now writing about what they have learned. They summarize it as follows: “We learned that trained non-lawyers can effec-
The project, however, also produced educational tensions. In an eighteen-month period, a group of roughly thirty students interviewed and provided limited advice to over 4400 pro se litigants. The sheer numbers sometimes overwhelmed the students' capacity to analyze the experiences, although the clinical teacher taught weekly seminars on both the structural professional responsibility issues and the discrete issues that regularly arose out of our limited-representational practice. A more substantial problem is that, without the project-creation experiences, the subsequent groups of students have not had the opportunities to learn from the structural ethical issues; nor have they the same degrees of investment and enthusiasm as the founders of the project.

Immigration Defense Project

Our immigration defense project was largely student-inspired. Four students, three of whom were Asian-Americans, helped the clinic establish the project. Among other things, they argued that this practice would allow them — as the children, grandchildren and relatives of immigrants — to connect their life experiences to their clinical practice and the work they hoped to do as lawyers. These students developed this workgroup in many of the same ways that the family law students did.

In sum, the same reasons that justify the use of the pluralistic method to make discrete ethical decisions apply to structural ethical decisions as well. There is an additional justification, however, for giving serious attention to the voices of students and clients in macro-selection decisions. These decisions present more potential tensions among and between legitimate interests of students, faculty and potential clients than do the discrete ethical decisions. This sharpens the need for pluralistic analysis so that the different perspectives can fairly
compete with each other, thereby producing better macro-selection
decisions.

PART III. ENRICHING CLINICS’ TREATMENT OF ETHICAL ISSUES BY
ADDED OTHER PERSPECTIVES

This section examines the ways in which clinics might enrich eth-
ics analysis and instruction by bringing attorneys, ethics professors
and social workers into the classroom. As we said and develop below,
we have found that these perspectives are particularly important to
fairly present and assess the interests of third parties in the ethical
decisions that we make.126

A. Co-Teaching With An Experienced Lawyer

Students bring different values to their clinical experiences and to
the process of ethical decisionmaking. In our initial conversations
about ethical decisionmaking, we encourage students to express their
diverse views. Students’ active participation is an underpinning of the
process by which we teach professionalism. At the same time, we
seek to help students critically evaluate their views and use what they
learn to improve the quality of their ethical decisions. To achieve
these goals, we sometimes co-teach clinic classes with practicing law-
yers. We will use one of our criminal defense workgroups to illustrate
this approach and its pedagogical benefits.

The students’ reasons for choosing to enroll in the criminal de-
fense workgroup vary widely. The workgroup supervisor is usually
able to identify students as fitting into one of three groups: the “curi-
ous,” the “specialist” and the “already committed.”

One or two students usually enroll because they are intrigued by
criminal law and want to learn more about how criminal defense law-
ners and clients co-exist. Because these “curious” students are uncer-
tain whether they will ever practice criminal law, they often question,
and sometimes resist, the clinic’s workload demands and client re-
sponsibilities. During class discussions, these students often voice
skepticism about the traditional, partisan concept of the defense law-
yer’s ethical obligation. They bring a sense of detachment to the work.

The majority of students in the workgroup are “specialists” who see
themselves as future litigators, perhaps (but only secondarily) as
criminal trial lawyers. They appear determined to practice criminal
law, although most are undecided whether they will prosecute or de-
defend. Their favorite law school courses were first-year Criminal Law,

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126 See infra note 170 for a summary description of the third parties whom our three co-
teaching arrangements identified.
and upper-level courses in Criminal Procedure, Evidence and Trial Litigation. Specialists are eager to learn lawyering skills from anyone who practices criminal law, especially highly-regarded trial lawyers. When considering ethical decisions, however, those students who previously worked in a prosecutor's or defender's office are frequently reluctant to revisit a viewpoint that conflicts with their mentor's or role model's conduct. Specialists often bring to the clinic a deep interest in the craft of trial practice, combined with opinionated views about a lawyer's ethical obligations.

In the third group are the students who want to become criminal defense lawyers. These students express a deep-rooted commitment to criminal defense work, usually based upon some aspect of their life experiences. They bring to the discussion a strong belief in zealous advocacy. These "already committed" students often find that their client-oriented views on ethical issues clash with those of the specialists, particularly those specialists who have had prior prosecution experiences.

In teaching professional responsibility, the workgroup supervisor accepts, and tries to build upon, these different sets of student motivations and values. To encourage free-wheeling discussion among the different subgroups, he adds an additional voice to the conversation: that of a practicing public defender. The public defender and the faculty supervisor do not always agree on ethical issues (indeed, this is precisely the pedagogical point) and students welcome the airing of opposing perspectives.

The public defender is an experienced and highly competent lawyer who is intimately familiar with the local system. The public defender carries a heavy caseload and has limited defense resources. She values her ongoing relationships with judges, prosecutors, police and court personnel. Students are well-aware of these realities.

The faculty supervisor is an experienced clinical teacher whose professional values have been deeply influenced by his prior experiences as a public defender. While he doesn't expect his students to develop the same passion he has for the defense function, he wants them to appreciate the criminal defense lawyer's ethical obligations and a lawyer's professional calling generally. Like most clinical teachers, the faculty supervisor appreciates the tension between encouraging students to develop their own ethical judgment and providing the best possible representation to clients. "I still find it difficult to gauge when to intervene and when to remain on the sidelines," he says. In

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127 While these courses are recommended for students who enroll in the workgroup, they are not required. Frequently, students take at least one of these courses simultaneously with the workgroup.
criminal cases, the dilemma of deciding how much supervisory direction to provide and how much discretion to leave to fledgling student attorneys is particularly acute because the ethical decision may result in the client's incarceration.

We offer two case studies to illustrate a process of ethical decisionmaking that uses the additional voice of the public defender to critically examine lawyer role issues. The issue is a familiar one: What should an attorney do when she believes there is a conflict between her duty to protect confidential information\textsuperscript{128} and her duty of candor to the court?\textsuperscript{129} Students in our criminal defense workgroup face this situation in many of their cases. While many scholars have addressed the issue,\textsuperscript{130} the confidentiality-disclosure conflict usually appears in our criminal defense practice in more ambiguous forms than it does in academic writings.\textsuperscript{131}

\textsuperscript{128} Maryland Lawyers' Rules of Professional Conduct follows in most respects the American Bar Association's Model Rules of Professional Conduct. Promulgated in 1983 and adopted by most states, Rule 1.6 reads in relevant part:

\textbf{CONFIDENTIALITY OF INFORMATION.}

(a) A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are implicitly authorized in order to carry out the representation, and except as stated in paragraph (b).

(b) A lawyer may reveal such information to the extent the lawyer reasonably believes necessary:

(1) to prevent the client from committing a criminal or fraudulent act that the lawyer believes is likely to result in death or substantial bodily harm or in substantial injury to the financial interests or property of another;

(2) to rectify the consequences of a client's criminal or fraudulent act in the furtherance of which the lawyer's services were used; \ldots \textbf{MODEL RULE 1.6}.

\textsuperscript{129} Rule 3.3 of the \textbf{MARYLAND RULES OF PROFESSIONAL CONDUCT}, reads in pertinent part:

(a) A lawyer shall not knowingly:

\ldots (2) fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client; \ldots

(b) The duties stated in paragraph (a) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6 [pertaining to confidentiality].


\textsuperscript{131} The author primarily responsible for this subsection expresses “disappointment” that the wealth of articles rarely focuses on the disclosure problems which arise most often in criminal defense practice. For an excellent exception, see Rodney Uphoff's \textbf{ETHICAL PROBLEMS FACING THE CRIMINAL DEFENSE LAWYER}, supra note 130, in which a group of practicing criminal defense lawyers analyze a variety of ethical issues which practitioners frequently face. Unfortunately, most scholarship has focused on two problems that rarely arise in actual practice: the perjuring client, and the client who brings evidence of a crime to his attorney. See, e.g., Harry Subin, \textit{The Criminal Lawyer's Different Mission: Reflections on the "Right" to Present a False Case}, 1 \textit{Geo. J. Legal Ethics} 125 (1987); Jane M. Graffeo, \textit{Ethics, Law and Loyalty: The Attorney's Duty To Turn Over Incriminating Evidence}, 32 \textit{Stan. L. Rev.} 977 (1980). During this author's more than twenty years of prac-
Ms. Ross' Case

Ms. Ross was charged with passing a bad check. Based upon the small sum involved, her good employment record and, most importantly, that she was the sole support for her two-year-old child, her student lawyers argued for "probation before judgment," an adjudication that avoids conviction. The prosecutor and judge agreed this was an appropriate disposition for someone with no prior convictions. Neither was aware of what Ms. Ross had informed her lawyers: She had been convicted of a similar crime in another state and had successfully completed a term of probation there.

During sentencing, the student lawyers remained silent whenever the prosecutor and judge referred to Ms. Ross' unblemished record. Neither the judge nor the prosecutor ever directly asked the students (or Ms. Ross) whether these assumptions were correct. Nor did they give any indication that they were relying on the students' silence in concluding that Ms. Ross had no record.

In the preceding week's class, the workgroup had anticipated and discussed this issue. The discussion was lively, and initially appeared evenly divided between those who favored disclosure and those who favored protecting the client confidence. Even Ms. Ross' lawyers were in opposite camps. Evelyn, who proudly wore the label of an already-committed defense attorney, saw this as your basic ethical slam-dunk. "Rule 1.6 is clear. Thou shall not reveal information which your client has disclosed which relates to representation. This is an adversarial system and I've not read a single case which says I am required to help the prosecution perform its role." But Eric, Ms. Ross' other student lawyer, wasn't convinced. He read Rule 3.3 as requiring a lawyer to disclose a client confidence when it is necessary to avoid helping a client commit a fraud upon the court. "Isn't it misleading, and fraudulent, for a lawyer to remain silent while a judge relies upon a criminal record which the lawyer knows to be incomplete?," he asked.

The public defender inquired whether students had researched the issue and found any relevant court decisions. Two students responded that the Maryland Court of Appeals had dismissed a disciplin-
nary charge against a lawyer who had maintained his silence, despite being present in court when his client had used an alias in an effort to hide a pending criminal charge. The court recognized the "great importance . . . of [an attorney] maintaining client confidentiality," although it acknowledged the hidden ethical minefields that await criminal defense lawyers and sustained a second related disciplinary charge, suspending the lawyer for forty-five days. The court's opinion seemed to satisfy Eric that his ethical duty required him to remain silent and to refrain from disclosing his client's out-of-state criminal record.

But in class, after the sentencing, Eric spoke about the moral tightrope criminal defense lawyers must walk. "I'm satisfied that Rule 1.6 prohibits client disclosures like Ms. Ross', but it feels strange to hide relevant information," he said. Some specialists, who had previously worked in a prosecutor's office, agreed. They wanted to know

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134 In Attorney Grievance Comm'n of Maryland v. Rohrback, 323 Md. 79, 591 A.2d 488 (1991), the attorney was present in the small courtroom where his client first appeared for a bail determination on a driving while intoxicated (DWI) charge. The lawyer remained silent, despite his awareness that the client was using an alias to prevent the judicial officer from learning about another pending DWI charge. The lawyer never identified himself as counsel for the accused and did not speak on his client's behalf. The Maryland Court of Appeals ruled that while the attorney "came perilously close," he did not violate the Rule 3.3 duty of candor to the court. Id. at 94, 591 A.2d at 494. On a second disciplinary matter, the court also dismissed a charge that the attorney violated his ethical duty by remaining silent at sentencing and not revealing that his client had an outstanding DWI case. In the court's opinion, the lawyer had no duty to volunteer such information. See Talley, supra note 130, at 194-95.


136 The Rohrback court sustained one charge against the lawyer: By appearing with the client at a pre-sentence investigation, and speaking to the Probation Officer, the attorney "confirmed" his client's false identity in violation of Rule 4.1 of the Maryland Rules of Professional Conduct. Id. at 99, 591 A.2d at 498. In the court's words, the lawyer had been "plunged into a legal ethics nightmare . . . and for a time . . . successfully navigated the course, but ultimately . . . was carried over the edge." Id. at 82, 591 A.2d at 490.

137 Students also found two ethical opinions, issued by the American Bar Association Committee on Professional Ethics, which focused upon a lawyer's duty to disclose a client's criminal record. See ABA Comm. on Ethics and Professional Responsibility, Formal Op. 287 (1953); ABA Comm. on Ethics and Professional Responsibility, Formal Op. 87-353 (1987). After reading these opinions, the students concluded that a client's confidences must be protected as long as there has been no client fraud or perjury. In Opinion 287, the ABA Committee concluded that the Code placed no affirmative duty upon a lawyer to correct a court's incorrect assumption about a client's criminal record when the information came directly from the client. It mandated that the lawyer remain silent. When the client made a false statement to the court, however, Opinion 287 required the lawyer to try to persuade the client to correct his false representation and authorized the lawyer to withdraw from the case if persuasion failed. In Formal Opinion 87-353, decided under the more recent Model Rules of Professional Conduct, the ABA maintained its position on silence absent client fraud or perjury, but required disclosure when the client refused to correct a misrepresentation that he had made to the court.
the positions of the clinical supervisor and the public defender.

The two expressed differing philosophies. The public defender placed great value on her ongoing relationship with the court and prosecutor. She appeared in this courtroom on a daily basis and knew she would need the trust of the other players in future cases. Consequently, she expressed greater support for disclosure.

The faculty supervisor placed a higher value on confidentiality. For him, the question whether to protect Ms. Ross' was not difficult, both because the ethical rules require preservation of this sort of confidence, and because of his conception of his role within the adversarial system. He "sympathized with the public defender's plight, having been in the same position himself for many years." But, he told students that his "relationship with most judges and prosecutors improved only when they appreciated that his obligation as a criminal defense lawyer prohibited divulging client confidences."

Mr. Muhammed's Case

In defending Mr. Muhammed on assault charges, his student lawyers came to identify with their client's efforts to rid his neighborhood of drug traffickers. They built a strong self-defense claim, locating witnesses who saw the teenage complainant and other gang members beat Mr. Muhammed with baseball bats earlier that day because he tossed their drugs into the sewer. The students knew, however, that their chances at trial were not good. Mr. Muhammed had been the aggressor in the incident that led to his arrest; the neighborhood witnesses who supported his theory of defense were terrified to come to court; and the judge might find Mr. Muhammed's credibility to be shaky.138

On the first trial date, the complainant failed to appear. Early on the next trial date, the prosecutor promised to dismiss the charges if the complainant did not appear at the scheduled calendar call that day. During the court recess, the complainant suddenly appeared and asked Mr. Muhammed's student lawyer what had happened. The student said nothing. The complainant then sat outside the courtroom with his mother and remained there when the court resumed session. The prosecutor did not know he was present.

Waiting in the hallway before the case was called, the students wondered what they should do. Should they tell the prosecutor about the complainant's arrival? Should they remain silent and see whether the court would dismiss the charges? Or should they affirmatively move to dismiss the charges, based on the State's inability to proceed?

138 He had two prior convictions for armed robbery.
If so, what should they say in support of the motion? What if the prosecutor sought a postponement to find the complainant? Should the students oppose it? What if the complainant entered the courtroom and told the prosecutor that he had been present and had spoken to the student lawyer? How would the prosecutor and judge react?

The faculty supervisor asked the students to resolve the ethical issue. This case was different from Ms. Ross. The answer to this ethical question was not apparent in the Rules. There were reasonable arguments on both sides of the issue and it would not be an ethical "mistake" to adopt either position.

Before the students made their ethical decision, they consulted with the public defender, as well as the supervisor. (The public defender co-counseled each of the cases.) Again, they viewed the problem differently. The supervisor thought there were good reasons to remain silent, particularly given the broad definition of protected information in Rule 1.6. The public defender argued that the students' duty to the court trumped their obligation to protect the information.

The supervisor deferred to the students for several reasons. It was late in the semester and he had gained confidence in their judgment and commitment to defense representation. They had made the transition from law student to lawyer. During discussions with the supervisor and Public Defender, the students had asked all of the right questions and were reasonably examining the arguments in support of each position. The students were ready to make, and would derive educational benefits from making, the judgment on their own. Moreover, resolution of the problem seemed to depend as much on conventional morality as professional ethics.

139 Model Rule 1.6(a) requires an attorney not to disclose "information relating to representation of a client." Had the client informed the attorney of the complainant's whereabouts, this communication would have been protected from disclosure under the Rule. Although the attorneys independently "discovered" this information, this too should be covered by the broad formulation of protected information in Model Rule 1.6. See Model Rules of Professional Conduct Rule 1.6 cmt. "The confidentiality rule applies not merely to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source." Geoffrey C. Hazard, Jr. & W. William Hodes, 1 The Law of Lawyering § 3.3:205 (1996 Supp.) (noting that attorneys are prohibited from disclosing information under Rule 1.6 "unless required to do so under another provision of the Rules").

However, the students believed, and the supervisor and public defender agreed, that Model Rule 1.6 and 3.3 precluded them from referring to the complainant's absence in moving to dismiss, or from moving to dismiss at all if it implied the complainant's alleged absence was a ground for the motion. Maryland's lawyers must disclose information relating to representation of a client which is necessary to avoid violating Rule 3.3. See Model Rule 3.3(b) (disclosure is required "even if compliance requires disclosure of information otherwise protected by Rule 1.6").
After an extended discussion with Mr. Muhammed, in which he
gave his consent, understandably reluctantly, the students informed
the prosecutor and the court that the complainant was present. They
didn’t believe they were required to do so, but concluded that it was
permissible under The Rules of Professional Conduct. And, although they struggled to explain why, a decision to remain silent in
this situation seemed less justifiable than in Ms. Ross’ case. In the
earlier case, the court had heard many facts about the defendant during
the sentencing proceeding from both sides, and the prosecution had ample opportunity to discover and advise the court of the defendant’s criminal past. In Mr. Muhammed’s case, unlike Ms. Ross’ case, the prosecutor’s ignorance of the critical information was not attribut-
able to the prosecutor’s lack of diligence.

The students were, of course, influenced by practical considerations as well. What if they said nothing about the complainant’s pres-
ence and the complainant walked into the courtroom as they were in
the middle of their dismissal argument? Could they avoid implicitly misrepresenting the facts, by simply moving to dismiss the case without saying anything further? But, if they said only “defendant moves to dismiss, your Honor,” wouldn’t they be guilty of implicitly misrep-
resenting the fact since the motion obviously would be based on the complainant’s “absence”?

They explained these reasons for disclosure to Mr. Muhammed. In court, the prosecutor listened closely to their presentation and nego-
tiated a plea agreement that satisfied Mr. Muhammed, although he obviously would have been more pleased with an outright dismissal.

In the following class, the students, public defender and supervi-
sor continued to discuss two related ethical questions in Muhammed’s
case. Were there good reasons to narrowly construe “information re-
lating to representation” to put the knowledge of the complainant’s presence outside its protection? Or, if not, were there acceptable moral reasons to disclose? The discussion produced two different an-
wers. Some students and the public defender supported a narrow reading, or even the nullification, of Rule 1.6 because there was no reason, rooted in a legitimate conception of the lawyer’s role, to pro-
tect the information. The strong reasons for preserving the confiden-
tiality of client communications and work product did not exist here.

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140 See supra note 139.
141 The prosecutor in the Muhammed case had subpoenaed the witness to appear in
court and called the witness’s name at the beginning of the court calendar and when the
case was called. The witness was late for court and remained outside the courtroom, unbe-
knownst to the prosecutor. The prosecutor’s only “fault” was in failing to call the witness’s
name outside the courtroom.
Therefore, there was no basis to prefer role-differentiated morality over conventional morality.

The supervisor and other students disagreed. They argued that there was good reason to require the prosecutor to meet the state's burden of proof, and one element of the burden is assuring that the state's witnesses are in the courtroom when the case is called. Although, the prosecutor's negligence was slight, the state should bear the consequences of the complainant's absence.

The supervisor, reflecting on these cases, says:

I struggle regularly with wanting to make sure students answer ethical questions correctly, yet hoping they will develop their own thoughtful responses. Even in cases like Ms. Ross', where the Rules are reasonably clear, students (and no doubt, some practicing lawyers) react with moral indignation against non-disclosure. When faced with more nuanced situations, like the "missing" complainant, Mr. Muhammed's student lawyers made a decision others might have decided differently. I think their decision was justified. I am not sure Mr. Muhammed would agree.

For students analyzing these disclosure problems, the voice of the public defender was important. She had strong pragmatic reasons, rooted in her experience, for her position. By describing the many other present and future clients to whom she had duties, and how she thought her failure to disclose in one case would affect the others, the public defender implicitly rejected an entirely individualistic conception of the client. This provided an important context for critically analyzing standard role conceptions.

The clinical supervisor understood her position, but disagreed with it. He had developed his philosophy of advocacy during a substantial professional career and believed a defense lawyer had an ethical obligation to each individual client, not to those whom he would represent sometime in the future.

The presentation of competing viewpoints led to active student participation, including by students who might not otherwise have done so (particularly the "curious"). In addition, the public defender's participation invited the students to consider the powerful impact that the form of one's practice may have on ethical decisions and to identify the ethical options that lawyers with large caseloads frequently consider.\footnote{A recent report by the American Bar Association's Accreditation Commission similarly concluded that adjunct clinical teachers can "enrich a law school's curriculum" by, among other things "providing a different perspective." Wahl Commission, supra note 117, at 26. In its Report the Commission noted that the ABA Standards Review Committee had concluded that "a law school \textit{should} use skilled and experienced practicing lawyers and judges as part-time faculty because they contribute to the enrichment of the educational}
B. Co-Teaching With A Professional Responsibility Teacher

Several law schools have combined clinical practice and the traditional legal ethics course. On occasion, we have combined the traditional three credit classroom course with a four or seven credit clinical course. In these hybrid courses, clinical students, the clinic supervisor and an ethics professor have used traditional classroom discussions, a legal ethics coursebook and a structured course syllabus to identify and analyze ethical issues that arose in the students' clinical practices. The co-teachers argue that this integrated format breathes desperately needed life into the traditional legal ethics course, which they nominate as "the dog of the curriculum," and compare, in terms of student interest, to a "high school session on personal hygiene." They argue that the integrated format has important benefits for clinical teachers as well.

They claim that the integrated format "uneartns ethical issues that [are] buried" in clinical practice. We make a reciprocal claim: the integrated format helps students construct fundamental ethical principles that the Rules do not contain. We deal with these two points separately.

To make their point, the co-teachers use a probation revocation case in which the client, L.M., "was an alcoholic in denial. He had been arrested on three prior occasions for assaulting C, the woman with whom he lived." L.M.'s student attorneys, Sherry and Barbara, were trying to develop an alcoholism-treatment plan for L.M. that they could present to the judge as an alternative to re-incarceration. The classroom discussions of L.M.'s case surfaced two troubling ethical issues. First, before urging the treatment program administrator to quietly accept a court-ordered treatment plan that would have the effect of "leap-frogging" L.M. to the top of the "waiting list" for scarce treatment slots, should the student lawyers consider the interests of the bypassed people who had voluntarily sought treatment for their potentially deadly addictions? Second, without misrepresenting facts, what could the students ethically say to the

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143 See, e.g., Shaffer, supra note 6 (describing Notre Dame Law School's integrated legal ethics/clinic course).
144 Luban & Millemann, supra note 5, at 37.
146 Id. at 66.
147 Luban & Millemann, supra note 5, at 68.
148 Id. at 72-73.
program administrators about L.M.'s interest in seeking treatment, which they privately doubted?

In the case conferences with their clinic supervisor, the student lawyers had thought solely in terms of L.M.'s interests: primarily his chance to avoid incarceration and secondarily his opportunity to turn his life around, if he would. This clinical practice, like many, was client-centered. They had not considered the interests of the arguably more deserving, but much more distant, wait-listed applicants for treatment; nor had they scripted what they intended to say to the program administrator to avoid making ethically prohibited "false statement[s] of material facts." The co-teachers report that the legal ethics classes "dignified, formalized and thus invited ethical inquir[ies]" like these.

Conversely, the integrated format helps students develop central ethical principles that have no life in the rules or classroom. As an example, we offer Model Rule 1.3. The drafters reduce the core moral duty of lawyers to two undefined words, "reasonable diligence," and rhetorically describe a lawyer's craft in nine conclusory lines of the accompanying Comment. Most legal profession textbooks say little or nothing about this essential professional duty and, in much of law practice, diligence is little more than a myth. We observe workloads that are out of control, not "controlled so that each matter can be

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149 See Dinerstein, supra note 60. Dinerstein contends that clinical teachers, particularly those legal services and public interest lawyers who developed clinical programs in the 1970's and 1980's helped develop the concept of "client-centered lawyer." Id at 518-19. Dinerstein considers criticisms of this approach that, although "ultimately unpersuasive," id. at 556, trouble him, including that the client-centered approach fosters excessive client autonomy. Id. at 557-70.

150 Model Rule 4.1 prohibits such false statements. Model Rule 4.4 provides few additional protections for third parties. It merely forbids things which already are illegal and patently immoral: "using means that have no substantial purpose other than to embarrass, delay, or burden a third person" and "violating the legal rights" of a third party to obtain evidence. The drafters found it "impractical" to identify any other duties owed to third parties. See Comment, Model Rule 4.4.

151 Id. at 73.

152 There are good practical reasons as well to use an integrated format. We struggle to find enough time to help students develop basic competencies, establish appropriate relationships with their clients, create and implement case plans, respond creatively to unyielding and arbitrary bureaucracies, rehearse performances, deal with opposing counsel, and identify the responsibilities they owe decisionmakers. By adding an ethics professor and a more structured classroom approach to clinic-based ethics teaching, we can make time for the teaching of professional responsibility, which is an "important rationale," Mark Spiegel, Theory and Practice in Legal Education: An Essay on Clinical Education, 34 UCLA J. L. REV. 577, 592 (1987), and "one of the chief arguments for clinical legal education." Michael J. Kelly, Notes on the Teaching of Ethics in Law School, 1980 J. LEGAL PROF. 21, 28.

153 Model Rule 1.3, Comment 1.
handled adequately. Because Rule 1.3 has no real content, it is usually unenforced, except in the most egregious cases of malpractice in which the lawyer's chronic inattention prejudices a client's claims. The profession, by and large, allows courts to define the diligence baseline in legal malpractice jurisprudence, and says little about the extraordinary range of "good practice" standards above the baseline. Ethics professors usually follow suit.

The diligence duty is contextual, and any one clinical program offers numerous situations that permit the development of appropriately nuanced standards. We have described representational models in which students have only a few clients upon whom they lavish attention, and a high-volume model in which students provide legal services to clients in interviewing and counseling sessions that usually last less than one-hour. The various standards of diligence reflect these contexts and embody different conceptions of the lawyer's role.

By bringing the variety of diligence standards, from legal myth to contextual reality, into the legal ethics classroom, the integrated format invites students to identify the ethical vacuum in Model Rule 1.3 and develop a real diligence principle from the interaction of practice and moral theory.

C. Co-Teaching with a Social Worker

Practicing attorneys and law professors have valuable perspectives, but generally they are largely legal perspectives. Increasingly, the tripartite relationship among client, law student and clinical teacher is giving way to a quadripartite model that includes a representative of another profession. In our clinical law practice, we integrate the services and perspectives of the social work profession by co-teaching with a Clinical Instructor from the University's School of Social Work and encouraging law students and social work students to work together.

154 Id.
155 "The classic pattern presented by conduct violating Rule 1.3 is that of the lawyer who takes on a matter and then lets it slide, frequently missing a limitations period, a court-imposed deadline or a court appearance. The lawyer then either ignores client inquiries, or responds with false assurances." American Bar Association Center for Professional Responsibility, ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT (3d ed.) (1996) at 28.
156 Compare the case studies in Parts I (A) & (B) and III, with the description in Part II (C) of the legal services provided by the Family Law Assisted Pro Se Project.
157 An informal survey of clinical law programs in the spring of 1996 indicated that there are currently 13 clinical law programs in the country that have a social work or mental health component. The survey was conducted by asking that subscribers to a clinical law listserv to indicate whether they collaborate with social workers. Given the informal nature of this survey, we expect that this is an underestimate.
From the client’s viewpoint, the prime virtue of this social work component is its holistic approach to client service. The social services both implement legal strategies and respond to the client’s larger social needs. For example, with the help of social work students, we have presented decisionmakers with community-based sentencing options, alternatives to institutional commitment, employment plans and treatment plans as integral parts of our legal strategies. These services have strongly supported our legal arguments and have helped some clients resolve the human problems that generated the legal problems.

Our interdisciplinary collaboration has educational benefits for both professions. The social work professor has helped our law students better understand the social issues that predominate in our practices. For example, the social work professor and the AIDS workgroup supervisor have co-taught classes about the psychosocial issues faced by clients with HIV/AIDS, the ways in which issues of difference affect a professional’s relationship with a client and how clients can take more responsibility for resolving their problems (i.e., become “empowered”).

Social workers and lawyers also use common skills, particularly interviewing, counseling and administrative advocacy. Our social work professor has helped us teach these skills more effectively to law students.

We will focus here, however, on the use of the social worker to critically analyze the lawyer’s role. We have found that social workers: (1) challenge us to expand our concept of the client’s “problem” from narrowly conceived legal issues to larger life problems; and (2) require us to think more carefully about the interests of third parties.

Here is one example of the first point. A client came to the clinic for legal assistance in obtaining a divorce. The legal problem she presented was a family law problem. There were various tasks the law student and client would have to perform to obtain the divorce. The client balked at performing some of her tasks, like gathering financial records and her children’s school records. For the social work student, the client’s “presenting problem” was broader than a family law issue. In discussions with the social work student, the client revealed that her husband was physically abusing her and that her fear of her husband had virtually immobilized her. As we learned when we referred the client for a psychiatric evaluation, she was suffering from a form of post-traumatic stress syndrome. We had trained the law student, we thought, to look for social problems like this in “family law” cases. But, it was the social work student’s broader conception of the

158 See supra Part I(B).
"presenting problem" that produced the information.

A criminal case the clinic handled, *State v. Fulton*, helps illustrate our second point — that the social worker's involvement can lead us to think more carefully about our duties to third parties. Our client, Evan Fulton, was charged with assault and battery, possession of a controlled dangerous substance and disorderly conduct. While drunk, Mr. Fulton had gotten into an argument with a convenience store manager and threw a half-eaten hot dog in his face. When the police searched Mr. Fulton after arresting him, they found a small quantity of cocaine in his trouser pocket.

In the initial case planning meeting to devise a "theory of the case," the student told the supervisor that various defense theories would require an assessment and substantiation of the client's chemical dependence and depression. Such an evaluation would also be valuable at sentencing, in the event of a conviction, because it would allow the defense to offer treatment and, if possible, employment as an alternative to incarceration; given the client's prior record, there was a real risk of imprisonment despite the minor nature of the charges. Looking beyond the strategic case-related considerations, the client plainly needed counseling and a job. After talking to Mr. Fulton, the clinic asked the social worker to evaluate Mr. Fulton.\(^{159}\) We thought that, in developing the interdisciplinary program, we had understood and agreed how we would resolve the conflicts that might be posed by the differing client confidentiality/disclosure obligations of the two professions. We were wrong.

The social work field supervisor assigned a social work student to the case who interviewed Mr. Fulton and his family. The interview with Mr. Fulton was uneventful, but Mrs. Fulton's interview was another story. She told the social work student that "when he was high," Mr. Fulton beat her and the two children. The beatings were becoming more severe, she said, and she showed the student several "figure 8" shaped marks on the back and buttocks of Jennifer, her eight-year-old daughter. Mrs. Fulton said "he used an extension cord on Jennifer" and "his hands on me." She pointed out marks on her neck and shoulders that Mr. Fulton "put there" when he violently "choked" her.

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\(^{159}\) Before making the referral, the supervisor and student discussed the complexity of this threshold decision. For example, "treatment alternatives" sometimes prove to be far worse than a short jail sentence. There are many misdemeanants who, in the name of treatment, are confined indefinitely in forensic facilities that are indistinguishable from prisons. There are many more prisoners serving longer sentences than they otherwise would have received for making, and then breaching, unrealistic promises to seek or to accept treatment. We carefully inform our clients of the risks and we do not make referrals without informed consent.
The legal team was distressed by this information and shocked when the social work student told them she intended to report these allegations to the local department of social services. She had no option, she said. Her supervisor agreed.\(^{160}\) After extensive discussion, in which the deans of the two professional schools participated, the social worker decided not to disclose the damaging information.

In analyzing the professions' conflicting ethical obligations, we had some of our best ethics conversations. Whereas lawyers are not required to reveal case-related confidential information without explicit or implicit client consent,\(^{161}\) social workers must reveal client confidences in a number of situations, most often when it appears that a child or vulnerable adult has been physically or sexually abused or that the client intends to physically harm someone else or himself.\(^{162}\) The norms of the profession grant social workers much greater discretion than lawyers to disclose client confidences, permitting disclosures, \textit{e.g.}, for undefined "professionally compelling reasons."\(^{163}\) Moreover, there is no ethical rule or consensus requiring social workers to "forewarn" a client of the limits of confidentiality.\(^{164}\) By comparison, law-

\(^{160}\) A recently enacted state statute had imposed upon social workers a duty to report child abuse and neglect. See Md. Code Ann., Fam. Law § 5-704. We believed that the common law attorney-client and work-product privileges, and Maryland Rule of Professional Conduct 1.6 (which protects "information relating to representation of a client"), precluded the social worker's disclosure obligations from attaching if he or she was a member of a criminal defense team. Subsequently, Maryland's Attorney General construed the statute in this way. See 75 Op. Att'y Gen. 76 (Opinion No. 90-007 (February 8, 1990)) (concluding that, when "the attorney's referral occurs after the initiation of a criminal proceeding against a defendant, as part of the attorney's trial preparation," there is an "exception" to the social worker's obligation to report "child abuse or neglect"). The social worker's duty to report, however, is not suspended in civil cases. Id. at 76. Our referral policy is consistent with this opinion. We pre-screen civil cases before we make referrals and explain the social worker's reporting duties to the client before we recommend that the client accept a referral. The social work student again informs the client of her reporting duties prior to beginning the interview.

\(^{161}\) Model Rule 1.6.


\(^{163}\) National Association of Social Workers, Code of Ethics II (H)(1) (1993). Indeed, depending upon the function they perform, social workers have significantly different conceptions of their disclosure duties and corresponding duties of confidentiality. To varying degrees, social workers owe ethical obligations to the individual, the employing agency, the community in which they work and the general public. See generally Frank M. Loewenberg & Ralph Dolgoff, Ethical Decisions For Social Work Practice (1996).

\(^{164}\) Some social workers believe they should warn a client of the limits of the profession's confidentiality privilege before they obtain any information from the client; others believe it is adequate to "inform" the client of these limits after the client has disclosed potentially damaging information that the professional must then report, but before the social worker pursues this line of inquiry. See Wesley Crenshaw & James Lichtenberg, Child Abuse and the Limits of Confidentiality: Forewarning Practices, 11 Behav. Sci. & L.
yers generally are permitted to reveal confidential information if they actually believe the client is going to imminently kill or seriously harm a third party.\textsuperscript{165}

The social worker and social work student persuasively explained the reasons for their ethical duties by describing in detail their interview with Mrs. Fulton and her children, and explaining why they would be at even greater risk in the future if the social worker failed to disclose the information. The facts, they said, suggested an abuse syndrome in which the violence often escalates, sometimes resulting in death. Five-year-old Mark and eight-year-old Jennifer were real children who had ugly wounds, and probably even worse psychological injuries. They were not disembodied parties in an appellate case or hypothetical people in a cleverly conceived simulation problem.

The comparative analysis highlighted the strengths and weaknesses of \textit{Model Rule} 1.6. The rule provides very little protection for third parties, limiting professional discretion for the sake of clients' personal privacy and individuality. The social worker's principles more substantially protect third parties (and the community), although sometimes at the cost of individuality and personal privacy.\textsuperscript{166}

The comparative analysis also provided a basis for evaluating how lawyers might exercise the ethical discretion that is afforded by the \textit{Model Rules}. This discretion is far broader than the limited right to disclose confidential information.\textsuperscript{167} It includes the substantial counseling discretion that lawyers have,\textsuperscript{168} and the lawyer's right, with the consent of the client, to impose conditions on the lawyer's agreement to represent the client.\textsuperscript{169}

\begin{footnotesize}
181, 184 (1993). The latter approach may discourage the client from disclosing further damaging information, but it does not protect what the client already has disclosed. Informal surveys suggest that forewarning is the exception, and informing is the rule. \textit{Id.} at 189. The critics of forewarning argue that it will discourage patients from entering into therapy and from providing the therapist with the information he or she needs to effectively treat the patient. They also claim that forewarning does not provide adequate protection to injured and vulnerable third parties. The non-binding Code of Ethics of the National Federation of Societies For Clinical Social Work (NFSCSW) (1988) is a limited exception to the majority practice. It states:

Clinical social workers reveal confidential information to others only with the informed consent of the client, except in those circumstances in which not to do so would violate the law or would result in clear and imminent danger to the client or to others. Unless specifically contraindicated by such situations, clients should be informed in advance of any limitations of confidentiality.

\textit{Id.} at 187 (quoting from the NFSCSW Code of Ethics, 13, § 5, para. A).

\textsuperscript{165} \textit{Model Rule} 1.6.

\textsuperscript{166} Glynn, \textit{supra} note 162.

\textsuperscript{167} \textit{Model Rule} 1.6.

\textsuperscript{168} See \textit{Model Rule} 2.1.

\textsuperscript{169} See \textit{Model Rule} 1.2 (C).
\end{footnotesize}
The *Fulton* case, and the ensuing conversations about it, caused us to briefly reconsider whether collaboration was worth the risks. We and the students, however, quickly recognized that the introduction of this “fourth voice” improved the quality of our ethics conversations.\textsuperscript{170} Of course, we also appreciate the comprehensive services the social work instructor and students provide to our clients, and the many ways in which they help us accomplish our strategic goals.

**PART IV. CONCLUSION**

We contend that clinical teachers and students make better ethical decisions, and that we teach ethics better, through a pluralistic model of ethical analysis. The usual three-party clinical relationship produces substantial pluralism.\textsuperscript{171} By co-teaching clinic-based ethics classes or courses we effectively add the representative perspectives of others. By modeling pluralistic inquiry, we give students a method of ethical analysis that they can use as lawyers to develop ethical judgment. This is a distinctive component of a good legal ethics education, which even the best legal ethics courses often fail to include.

The pluralistic method often will produce a consensus right answer. When it does not, there are various factors that might inform the supervisor’s decision to defer (or not) to the student. Some types of knowledge are more relevant than others. If the ethical issue turns on facts or a fact-based evaluative judgment, for example, the student’s knowledge may be the most relevant.\textsuperscript{172} If the ethical answer depends on experience-based knowledge, the supervisor’s experience often will be more important.\textsuperscript{173} The educational benefit the student might gain

\textsuperscript{170} As previously noted, the social workers’ perspectives and experiences helped us to focus on third parties such as potential future clients, including poor people who have the same entitlement to service as our clients, vulnerable members of a client’s family, and groups to whom the clinic might consider providing legal help.

\textsuperscript{171} We have described various forms of balance among the perspectives of client, student and supervisor: (1) the supervisor’s general knowledge, with the student’s case-specific information, *see supra* Parts I(A)(2), I(A)(3)(b) (Tony’s case); (2) the supervisor’s more detached relationship with the client, with the student’s frequently more personal relationship, *see id*; (3) the supervisor’s broader educational and systemic service goals, with the student’s client-focused goals, *see id*; (4) the supervisor’s understanding of the real-world bodies of substantive and procedural law, with the student’s formalistic conception of law, *see Parts* I(A)(1), I(A)(3)(a) (Ms. Brown’s case); and (5) life experiences, values and interests of the client, with those of the supervisor and student. *See supra* Part I(B) (four AIDS workload case studies), II (descriptions of macro-selection decisions).

David Chavkin recommends that clinical teachers consciously team students to produce several different forms of pluralism, which he argues improves the quality of their education and legal representation. We, of course, agree. David Chavkin, *Matchmaker, Matchmaker: Student Collaboration in Clinical Programs*, 1 CLIN. L. REV. 199 (1994).

\textsuperscript{172} *See supra* Parts I(A)(2), I(A)(3)(b) (Tony’s case).

\textsuperscript{173} *See supra* Part I(A)(1) (Ms. Brown’s case).
by making the decision is another relevant factor.174 When the supervisor or student must make ethical decisions as she performs complex lawyering tasks, the supervisor might reasonably choose to be the primary actor.175 But, a supervisor might choose more generally to make some ethical decisions to teach ethics by modeling ethical behavior as well.176

Most important, the supervisor should make the ethical decision if she believes the student’s ethical answer is not right. But, how “right” must it be? If it is as right as the supervisor’s answer, there is reason to defer to the student’s choice, particularly if the student will learn by making the decision.177 If the student has a better basis for judgment, and the student’s decision seems reasonable, the supervisor could appropriately defer to the student.178

In a relatively small number of cases, however, at the end of the pluralistic analysis, the supervisor and student will disagree and have equal bases for judgment. The supervisor will conclude her’s is the better ethical answer. What should the supervisor do? If the answer depends on principles of legal ethics rather than common moral principles (to the extent one can disentangle the two), the supervisor should choose her own answer. Our ultimate goal is to teach students that lawyers should make the best possible ethical decisions, and thereby protect the interests of the client, opposing party, tribunal or a third person whom the lawyer’s better ethical principle protects. We undermine this transcendent goal, and probably violate our responsibilities under student practice rules and as supervisors,179 if we accept an ethical answer that we believe is not the right one under these circumstances.180

174 See supra Parts I(A)(2), I(A)(3)(b) (Tony’s case), III(A) (Mr. Muhammed’s case), II(B), II(B)(2), II(C) (describing educational benefits for students of making micro-selection and macro-selection decisions).
175 See supra Parts I(A)(1), I(A)(3)(a) (Ms. Brown’s case), I(B) (Mr. O’Connor’s case).
176 See Kotkin, supra note 115 (recommending that clinical teachers expand their use of modeling as a teaching technique: (1) to help students accept increasing legal work responsibilities, (2) by modeling one role in a co-counseled matter and then asking the student to perform the role, and (3) by teaching with a supervisor’s performance in an actual case, rather than simulated and other hypothetical games).
177 See supra Parts I(A)(2), I(A)(3)(b) (Tony’s case), III(A) (Mr. Muhammed’s case).
179 Model Rules of Professional Conduct, Rule 5.1.
180 We acknowledge the limits of our multi-factor test. Although we draw upon our larger experiences, we focus on a small number of only partially representative case studies to identify the factors. Ethical decisionmaking is contextual. Our factors will not apply in many contexts and others that we have not identified will. In addition, there are many shades of “right and wrong” and many forms of shared decisionmaking that do not fit neatly into our model.

We add one thought on the consequences of intervention. When a clinical supervisor overrides the ethical judgement of a student, the clinical supervisor might be obligated to
We acknowledge some doubts about whether this interventional option gives students adequate room to learn by making ethical decisions. However, through the pluralistic model, the student probably will have shaped, and thus partially “made,” the “supervisor’s decision.” Moreover, there should be a lower threshold for supervisory intervention in ethical decisions than, for example, in the execution of “skills.” Although some argue that a client can give consent to a minimally competent performance by a student that “damage[s]” him, but not “seriously,” a client cannot authorize a clinical supervisor or student to violate ethical principles, particularly when they protect the interests of the opposing party, a third party, the court or another person. In addition, ethical breaches generally are more serious than technical mistakes because they often suggest immorality rather than inattention or inexperience. Although we have not attempted to fully develop this theory of differential intervention, there appear to be more justifications for supervisory intervention in ethical decisionmaking.

We end by expressing the unstated premise in this article: The tensions that the competing perspectives in the pluralistic process produce are an important source of ethical development. We do not, however, seek to establish a Greek chorus for each ethical decision or attorney-client relationship. We can provide the necessary pluralism during the course of the entire clinical experience, some in the three-party clinical relationship, some in the classroom and some in other forms.

Pluralism also produces harmony and common ground. That common ground, as well as the tensions, has given us some of our best teaching experiences.

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implement the decision in some cases. For example, if the supervisor in Mr. Muhammed’s case had decided that the right ethical answer was to maintain the confidentiality of the information, it would have been neither fair nor educationally sound to require the students to carry out that decision in court. As we argue elsewhere, that decision was grounded as much in common morality as legal ethical principles. See supra Part III(A). If the complainant had appeared in the middle of the case, the judge might have concluded that the students were personally dishonest, and they may have been unwilling to implicate the supervisor. If they did, that choice would be painful as well. The decisionmaker should learn from the consequences of the decision.


182 Any “bargain” between a clinical program and client, of course, is subject to contract principles, including the principle that contracts in violation of public policy are void or voidable. Although one might justify a contract for less-than-competent legal services on the ground that at least some services will help the client more than none, we would not seek to justify such a contract on the ground that it provides educational opportunities to students.